

## INDEX

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	PAGE
Amended Notice of Appeal .....	1
Petition of Appeal .....	2
Answer to Petition of Appeal .....	4
Petition for Leave to Sue Receiver in Inter- pleader .....	5
Summons .....	8
Complaint .....	9
Consent Extending Time to Answer .....	12
Petition .....	12
Order to Show Cause on Petition .....	19
Answer to Petition .....	21
Affidavit of Receiver .....	23
Amended Petition .....	25
Consent to File Amended Petition .....	27
Answer to Amended Petition .....	28
Affidavit of Petitioner and Exhibits, Covered by Stipulation .....	31
Bond .....	35
Agreement .....	38
Statement of Account .....	42
Orders .....	43
Demands .....	45
Statements Furnished .....	46
Stipulation .....	47
Affidavit of Receiver .....	48
Order or Decree .....	49
Opinion .....	51

New Jersey State Library

**Amended Notice of Appeal.**

(Filed October 16, 1930.)

10

**In Chancery of New Jersey**

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76-583.

On Bill, &c.

On Petition of  
A. W. Crone &  
Son, Inc.

Amended Notice  
of Appeal.

20

(Decree made by Chancellor on advice of Bigelow, Vice-Chancellor.)

The Petitioner, A. W. Crone & Son, Inc., hereby appeals from the decree made in the above-entitled cause on October 1, 1930, on the Petition and Amended Petition of said A. W. Crone & Son, Inc., from the whole and every part of said decree, to the Court of Errors and Appeals and the Last Resort in All Causes.

30

Dated October 8, 1930.

MARSHALL VAN WINKLE,  
Solicitor for and of Counsel with  
Petitioner, A. W. Crone & Son,  
Inc., Appellant.

40

*Petition of Appeal.*

I conceive there is good cause for appeal in the above-entitled cause.

MARSHALL VAN WINKLE,  
Of Counsel with Petitioner, A. W.  
Crone & Son, Inc., Appellant.

10

(Service acknowledged.)

(Notice of appeal, service acknowledged, filed October 9, 1930.)

**Petition of Appeal.**

(Filed October 15, 1930.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

20

GEORGE K. NUTZ,  
*Complainant,*

*v.*

MURRAY-NUTZ, INC., a corporation,  
*Defendant,*

A. W. CRONE & SON, INC.,  
*Appellant.*

Petition of Appeal  
of A. W. Crone  
& Son, Inc.,  
Petitioner, from  
Determination of  
Receiver, &c.

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To the Honorable the Court of Errors and Appeals  
in the Last Resort in all Causes:

The Petition of A. W. Crone & Son, Inc., the appellant in the above entitled cause, respectfully shows that:

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1. The Petitioner finds itself aggrieved by the decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 1, 1930,

*Petition of Appeal.*

in a certain cause in said Court of Chancery wherein George K. Nutz was complainant and Murray-Nutz, Inc., was defendant, in this respect, to wit: That the said decree adjudges that the action of the Receiver of said Murray-Nutz, Inc., in disallowing the set-off claimed by A. W. Crone & Son, Inc., petitioner, should be affirmed, and that the claim of the petitioner set forth in the petitions filed by said petitioner said A. W. Crone & Son, Inc., cannot be set off against the debt upon which the said Receiver has brought suit against the petitioner, and petitioner appeals from the decree of the Chancellor, which decree is as aforesaid, upon the ground that the same is erroneous in that the action of the said Receiver in disallowing the set-off claimed by the petitioner A. W. Crone & Son, Inc., should not be sustained and that the claim of the petitioner set forth in petitions filed by the petitioner, should be directed to be set off against the debt due from the petitioner to the defendant corporation, upon which claim the said Receiver has brought suit against petitioner; that such set-off should be allowed as a just set-off, and that the same should be allowed according to law and equity and pursuant to the provisions of the Statute, and especially pursuant to the provisions of Section 66 of "An Act Concerning Corporations (Revision of 1896)" (Compiled Statutes of New Jersey, Volume 2, page 1643), and Section 78 of the same Act (page 677, Supplement Compiled Statutes New Jersey), and that the prayer of the petitions in the Court of Chancery to allow a set-off should have been granted, the same being equitable and just.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set

*Answer to Petition of Appeal.*

aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

MARSHALL VAN WINKLE,  
Solicitor for and of Counsel  
with Appellant.

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(Service acknowledged.)

**Answer to Petition of Appeal.**

(Filed October 17, 1930.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

20

<p>GEORGE K. NUTZ, <i>Complainant,</i></p> <p><i>v.</i></p> <p>MURRAY-NUTZ, INC., a corporation, <i>Defendant.</i></p>	}	<p>Petition of Appeal. Answer.</p>
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The answer of Martin J. Monahan, Jr., Receiver of Murray-Nutz, Inc., the above named appellee to the petition of appeal of A. W. Crone & Son, Inc., a corporation of the State of New Jersey, the above named appellant, respectfully shows that:

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1. That this appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order was on October 1st, 1930, made and entered in the Court of Chancery of New Jersey, in the above entitled cause for the purposes in said petition mentioned, and as therein set

*Petition for Leave to Sue Receiver.*

forth; but as to the substance and form of the said order, this appellee begs leave to refer thereto when the same shall be produced.

2. This appellee is advised and believes that the said order is agreeable to equity.

3. This appellee prays that the same may be affirmed with costs in favor of this appellee.

CHAS. RUBENSTEIN,  
Solicitor for and of counsel with  
Appellee Martin J. Monahan, Jr.,  
Receiver of Murray-Nutz, Inc.

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**Petition for Leave to Sue Receiver in  
Interpleader.**

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(Filed February 3, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation  
of the State of New Jersey,  
*Defendant.*

76-583.

On Bill, &c.

Petition for Leave  
to Sue Receiver.

30

The Petition of A. W. Crone & Son, Inc., a corporation of the State of New Jersey, whose principal office is located at 338 Palisade Avenue, Jersey City, N. J., respectfully shows:

1. That it has moneys in its hands, due from it under a certain building or construction con-

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*Petition for Leave to Sue Receiver.*

tract made by it with the State of New Jersey, represented by the State Board of Education, for the construction of the State Normal School on the Boulevard, Jersey City, N. J.

10       2. George K. Nutz, and/or Nutz & Reier, and/or George K. Nutz, Inc., supplied materials to petitioner in connection with the performance by petitioner of its said contract with the said State, and moneys are due from petitioner to George K. Nutz, and/or Nutz & Reier, and/or George K. Nutz, Inc., but petitioner cannot determine to which one of these it may, with safety, pay the amount due as aforesaid by petitioner.

20       3. Hudson Builders Corp., a corporation of New Jersey, supplied materials to said George K. Nutz, and/or Nutz & Reier, and/or George K. Nutz, Inc., in connection with the erection of said building, and moneys are due for such supplies by said George K. Nutz, and/or Nutz & Reier, and/or George K. Nutz, Inc., to said Hudson Builders Corp., to an amount that petitioner cannot ascertain.

30       4. On or about January 13, 1930, an Order of this Court was made in the above-entitled cause, appointing Martin J. Monahan, Jr., of Lyndhurst, N. J., Receiver of said Murray-Nutz, Inc. Said Receiver has made written demand on petitioner for the payment to him by petitioner of \$8,707.80, and said Hudson Builders Corp. has made demand in writing that petitioner pay to it the same debt so claimed by the said Receiver, to the amount of \$8,331.66, said sum being alleged by said Hudson Builders Corp. to be due to it from said Murray-Nutz, Inc., in connection with supply of materials  
40       by Hudson Builders Corp. to said Murray-Nutz,

*Petition for Leave to Sue Receiver.*

Inc., in connection with the erection of said building.

5. Said Hudson Builders Corp. threatens to bring action at law or suit in Chancery against petitioner or against the surety on the bond that petitioner executed to the effect that petitioner would comply with its said contract so made with the said State, and would pay all claims for materials. 10

6. Petitioner cannot determine to whom it may make payment with safety, and it desires to file Bill of Interpleader and to make the Receiver of said Murray-Nutz, Inc., appointed by this Court, a party defendant in interpleader proceedings.

Petitioner prays that an Order may be made, permitting petitioner to file its bill of interpleader in this Court against the Receiver of said Murray-Nutz, Inc., joining such Receiver as defendant with the other parties who make claim on petitioner in connection with the moneys claimed to be due as aforesaid, by the Receiver of Murray-Nutz, Inc. 20

Dated, January 31, 1930.

A. W. CRONE & SON, INC.  
By ANTHONY W. CRONE,  
President. 30

MARSHALL VAN WINKLE,  
Solicitor.

STATE OF NEW JERSEY, )  
HUDSON COUNTY,        ) ss.:

ANTHONY W. CRONE, of full age, being duly sworn on his oath, doth depose and say:

1. I am President of A. W. Crone & Son, Inc., a corporation of the State of New Jersey. 40

*Summons.*

2. The facts, matters and things stated in said petition are true, to the best of my knowledge and belief.

ANTHONY W. CRONE.

10 Subscribed and sworn to before me }  
this 31st day of January, 1930. }

FRANCIS V. MANY,  
Master in Chancery  
of New Jersey.

**Summons.**

20 THE STATE OF NEW JERSEY To: A. W. CRONE & SON,  
a corporation of the State of New Jersey:

30 YOU ARE SUMMONED to answer the annexed complaint of Martin J. Monahan, [L. S.] Jr., Receiver of Murray-Nutz, Inc., an insolvent corporation of the State of New Jersey, in an action at law in the Hudson County Circuit Court. AND TAKE NOTICE that unless you file an answer to said complaint with the Clerk of the Hudson County Circuit Court, at Court House, Jersey City, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Honorable Henry E. Ackerson, Jr., Esquire, Judge of the said Hudson County Circuit Court at Jersey City, this 2nd day of April, 1930.

JOHN J. MCGOVERN,  
Clerk.

40 CHAS. RUBENSTEIN,  
Attorney.

*Complaint.*

To the within named Defendant:

TAKE NOTICE that in case the within summons and complaint are served upon you personally, and if you intend to make a defense to the within stated cause of action, you must file an affidavit of merits within 10 days after service of the within summons and complaint upon you, and an answer within 20 days therefrom, and that in default thereof judgment will be entered against you. 10

CHAS. RUBENSTEIN,  
Attorney for Defendant.

**Complaint.**

20

HUDSON COUNTY CIRCUIT COURT.

MARTIN J. MONAHAN, JR., Receiver  
of Murray-Nutz, Inc., an insolvent  
corporation of the State of  
New Jersey,

*Plaintiff,*

*v.*

A. W. CRONE & SON, a corporation  
of the State of New Jersey,  
*Defendant.*

Action at Law.  
Complaint.

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The plaintiff, Martin J. Monahan, Jr., Receiver of Murray-Nutz, Inc., an insolvent corporation of the State of New Jersey, says that:

FIRST COUNT.

1. On January 13th, 1930, in a suit pending in the Court of Chancery, wherein George K. Nutz, 40

*Complaint.*

10 is complainant and Murray-Nutz, Inc., a corporation of New Jersey, is defendant, the plaintiff, Martin J. Monahan, Jr., was appointed receiver of the said Murray-Nutz, Inc., a corporation of the State of New Jersey, with all the powers and duties conferred upon him by an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporation (Revision of 1896)."

20 2. That on the 20th day of November, 1928, the defendant, A. W. Crone & Son, a corporation, entered into an agreement with Nutz & Reier, a corporation of New Jersey, wherein and whereby the said Nutz & Reier agreed to perform the plastering work for the erection and construction of the said State Normal School, Jersey City, New Jersey, for the sum of \$19,700.00.

3. That during the performance of the said work, certain extra work was ordered for an arch for which the defendant agreed to pay an additional sum of \$150.00.

30 4. During the performance of the said work aforesaid, it was agreed to allow the defendant the following deductions for waterproofing as agreed \$400.00, for plaster work done by another contractor \$32.73, totaling \$432.73.

5. During the performance of the said work payments were made by the defendant on account of the above contract and extra work, \$12,900.00, leaving a balance of \$6,517.27, which is now due and owing to the plaintiff, and which sum the said defendant fails and refuses to pay.

40 6. During the course of the said work the name of the said Nutz & Reier was changed to George K. Nutz, Inc., a corporation of New Jersey, and

*Complaint.*

subsequently the name of the said George K. Nutz, Inc., was changed to Murray-Nutz, Inc., a corporation of the State of New Jersey.

7. All the work was performed and all the materials was furnished necessary for the completion of the above agreement. 10

The plaintiff, therefore, demands as damages on this count the sum of \$6,517.27, besides interest from November 29th, and costs of suit.

## SECOND COUNT.

1. Plaintiff repeats all the allegations set forth in paragraphs 1, 2, 6 and 7 of the first count and hereby incorporates same in this count without repeating same in full. 20

2. On or about October 21st, 1929, the defendant requested the plaintiff to perform certain labor and furnish materials on the Fishnet & Twine Building, Jersey City, New Jersey, for which the said defendant agreed to pay the sum of \$51.47.

3. The said sum of \$51.47 is a reasonable charge.

4. The defendant failed and refused to pay the said sum, although demand for same was made. 30

The plaintiff, therefore, demands as damages on this count the sum of \$51.47, besides interest from October 21st, 1929 and costs of suit.

CHAS. RUBENSTEIN,  
Attorney for Plaintiff.

**Consent Extending Time to Answer.**

HUDSON COUNTY CIRCUIT COURT.

10	MARTIN J. MONAHAN, JR., Receiver of Murray-Nutz, Inc., an insol- vent corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	Consent.
	<i>v.</i>		
	A. W. CRONE & SON, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>		

20 It is consented and agreed that the defendant's time to file Answer is extended until ten days after hearing on Order to Show Cause on Petition of A. W. Crone & Son, Inc., in the suit of George K. Nutz, Complainant *v.* Murray-Nutz, Inc., a corporation, in Chancery of New Jersey.

Dated April 14, 1930.

CHAS. RUBENSTEIN,  
 Attorney of Plaintiff.

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**Petition.**

30 (Filed April 14, 1930.)

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The Petition of A. W. Crone & Son, Inc., a corporation of the State of New Jersey, whose principal office is in Jersey City, N. J., respectfully shows:

40 1. On or about October 13, 1928, petitioner entered into an agreement in writing with the State

*Petition.*

of New Jersey, represented by the State Board of Education, in and by which agreement petitioner agreed to do and perform the general construction work complete in connection with the completion of the State Normal School, situated on Hudson Boulevard at Culver Avenue, Jersey City, N. J., for the sum of \$415,189. 10

2. Thereafter, petitioner entered upon the performance of said agreement and proceeded to the completion of the work to be performed by the said contract, and the same has been completed and accepted by the said Board of Education.

3. Nutz & Reier, plastering contractors, entered into an agreement with petitioner, whereby said Nutz & Reier agreed to do certain plastering and other work in connection with the performance of the said contract by petitioner. Thereafter, the name of Nutz & Reier was changed to George K. Nutz, Inc., a corporation of New Jersey, and subsequently the name of the said corporation George K. Nutz, Inc., was changed to Murray-Nutz, Inc., and said Murray-Nutz, Inc., succeeded to all the rights and obligations of said Nutz & Reier. 20

4. On or about January 13, 1930, Martin J. Monahan, Jr., was appointed Receiver of the said corporation of Murray-Nutz, Inc., the same then and there being adjudicated to be an insolvent corporation, in a proceeding in the Court of Chancery, brought by George K. Nutz as complainant; and on or about January 27, 1930, said Martin J. Monahan, Jr., was continued as such Receiver, by Order of said Court duly made, and he entered upon the discharge of his duties as such Receiver and is now acting as Receiver of the said insolvent corporation Murray-Nutz, Inc. 30 40

*Petition.*

5. Petitioner executed a bond, dated October 13, 1928, to the said State of New Jersey, conditioned for the performance by the complainant of its said Agreement with the said State, and the payment in full of all material supplied, and the Fidelity and Deposit Company of Maryland executed said bond as surety for the performance of the same by petitioner.

6. Any amount of money due from petitioner to said Murray-Nutz, Inc., because of the plastering and other work agreed to be done or done by said Nutz & Reier, is now due and owing to the said Receiver of Murray-Nutz, Inc., appointed by this Court as aforesaid, or needs to be paid to the persons, firms and corporations that supplied material to said Nutz & Reier, George K. Nutz, Inc., and Murray-Nutz, Inc., in connection with said work, for the account of said Murray-Nutz, Inc.

7. Hudson Builders Material Corporation, a corporation, supplied material to Nutz & Reier, and/or George K. Nutz, Inc., and/or Murray-Nutz, Inc., in connection with the said contract.

8. Washburn Brothers Co., Inc., a corporation, supplied material to Nutz & Reier, and/or George K. Nutz, Inc., and/or Murray-Nutz, Inc., in connection with the said contract.

9. Said Hudson Builders Material Corporation claims that there is due to it from said Murray-Nutz, Inc., for the material supplied by it to said Murray-Nutz, Inc., the sum of \$6,331.86; and said sum is so due; and on October 21, 1929, said Hudson Builders Material Corporation served a notice upon petitioner, demanding that petitioner pay directly to the said Hudson Builders Material Cor-

*Petition.*

poration the sum of \$5,345.35, which amount was due on that date because of materials supplied by said Hudson Builders Material Corporation to said Murray-Nutz, Inc., and which sum is parcel of the said sum of \$6,331.86. Subsequently to making said demand for payment, said Hudson Builders Material Corporation supplied other materials to the said Murray-Nutz, Inc., and the price charged therefor, and the reasonable value thereof, was to a total of \$6,331.86, and subsequently to said October 21, 1929, and prior to the appointment of the said Monahan as Receiver of said Murray-Nutz, Inc., said Hudson Builders Material Corporation demanded payment of said sum of \$6,331.86 from said Murray-Nutz, Inc., and from petitioner.

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10. Washburn Brothers Co., Inc., a corporation, supplied materials in connection with the performance of said contract, to said Murray-Nutz, Inc., and the price charged for such material and the reasonable value thereof is \$452.85; and on December 9, 1929, said Washburn Brothers Co., Inc., served a written notice on petitioner, demanding that petitioner pay said sum to said Washburn Brothers Co., Inc.; and prior to the appointment of said Receiver, Washburn Brothers Co., Inc., demanded payment of said sum from said Murray-Nutz, Inc.

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11. Said Monahan, as Receiver as aforesaid, shortly after his appointment as aforesaid, demanded that petitioner pay to him the sum of \$6,517.27, claiming that petitioner was indebted to said Murray-Nutz, Inc., to that amount, and said Monahan, as Receiver as aforesaid, has instituted an action-at-law in the Hudson County Circuit Court, against petitioner, and the complaint served

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*Petition.*

on petitioner in said action-at-law demands that petitioner pay to said Receiver the sum of \$6,517.-27, with interest from November 29th, and costs of suit.

10       12. Complainant avers that by force of the Statutes of the State of New Jersey and the said bond executed by petitioner as aforesaid, that petitioner is and has continuously been during all the time that Nutz & Reier, and/or George K. Nutz, Inc., and/or said Murray-Nutz, Inc., were supplying materials used in completion of the said contract, liable to pay all amounts that were due, as they became due, to said Hudson Builders Material Corporation and to said Washburn Brothers Co.,  
20       Inc., should said Murray-Nutz, Inc., not pay the same; and that petitioner was liable to pay said sums as herein stated by force of the Statute of New Jersey, and because of said bond given by petitioner, and because of the several demands for payment so made by the said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc., before the appointment of said Monahan as Receiver of said Murray-Nutz, Inc.

30       13. Petitioner shows that the dealings of petitioner with said Nutz & Reier, and George K. Nutz, Inc., and said Murray-Nutz, Inc., were mutual dealings, and that from time to time petitioner paid on account of these mutual dealings to said Murray-Nutz, Inc., large sums of money, and that the said sum so claimed by said Receiver, and said sums so claimed by said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., are claimed in connection with said mutual deal-  
40       ings.

14. Petitioner avers that as said Murray-Nutz, Inc., prior to the appointment of the said Monahan

*Petition.*

as Receiver demanded payment from petitioner of the said sum of \$6,517.27, petitioner was then entitled to a set-off against said Murray-Nutz, Inc., of the amounts so due to the said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc., as aforesaid; and petitioner shows that the total of these two amounts is in excess of the said sum of \$6,517.27. 10

15. Petitioner shows that unless the said Receiver is restrained by the order of this Court, he will proceed to judgment against petitioner in the said action-at-law so brought by said Receiver; and that petitioner in said action-at-law cannot interpose equitable set-offs with respect to the liability of petitioner to pay the said claims due to said Hudson Builders Material Corporation and Washburn Brothers Co., Inc.; and petitioner is without remedy except in this Court. 20

16. Petitioner avers that it has requested the said Receiver to allow as a just set-off against the said sum of \$6,517.27 so claimed by said Receiver as due to him as such Receiver from petitioner, the said sums so due to said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., but said Receiver has refused to allow such just set-off in favor of petitioner, although the same should have been allowed by the said Receiver as a just set-off and according to law and equity. 30

17. Petitioner avers that unless said Receiver is ordered by this Court to allow as a just set-off, the sums which petitioner is liable by law to pay to said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., petitioner may be compelled not only to pay the said Receiver the amount claimed by him, but also the said sums so 40

*Petition.*

claimed by said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc.

10 18. Petitioner avers that the actions of the said Receiver in the premises are unconscionable; and that petitioner is aggrieved by the action and determination of the said Receiver in the premises, and petitioner appeals therefrom to the Court of Chancery.

20 Petitioner prays that Martin J. Monahan, Jr., Receiver herein, be ordered and directed by this Court to allow as a just set-off, the amounts so claimed by said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc., as due to them respectively for materials supplied by them respectively to the said insolvent corporation, Murray-Nutz, Inc., in connection with the contract herein mentioned, as against the amount claimed by said Receiver as aforesaid; that said Receiver be directed to allow such set-off as a just set-off that should be made according to law and equity; that said Receiver be ordered to make such set-off upon petitioner actually paying the said amounts so claimed by said Hudson Builders Material Corporation and said Washburn Brothers  
30 Co., Inc., and supplying and delivering to the said Receiver receipts signed by Hudson Builders Material Corporation and Washburn Brothers Co., Inc., showing that petitioner has actually paid said sums to said Hudson Builders Material Corporation and to Washburn Brothers Co., Inc., respectively.

And your petitioner will ever pray, etc.

40 A. W. CRONE & SON, INC.,  
By ANTHONY W. CRONE, President,  
Petitioner.

MARSHALL VAN WINKLE,  
Solicitor and of Counsel  
with Petitioner.

*Order to Show Cause on Petition.*

STATE OF NEW JERSEY, }  
 HUDSON COUNTY, } ss.:

JOSEPH A. CRONE, of full age, being duly sworn on his oath doth depose and say:

I am the Secretary of A. W. Crone & Son, Inc., the petitioner in the foregoing Petition. 10

The facts, matters and things therein stated are true except as to matters stated on information and belief, and as to such matters I believe the same to be true.

JOSEPH A. CRONE.

Subscribed and sworn to before me }  
 this tenth day of April, 1930. }

CLARENCE KELSEY, 20  
 Master in Chancery  
 of New Jersey.

**Order to Show Cause on Petition.**

(Filed April 14, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76-583.  
 On Bill, &c.  
 Order to Show  
 Cause on Peti-  
 tion of A. W.  
 Crone & Son,  
 Inc.

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The duly verified Petition of A. W. Crone & Son, Inc., having been filed, wherein said A. W. Crone & Son, Inc., pray that an Order may be made di- 40

*Order to Show Cause on Petition.*

recting the Receiver of the above-named defendant, an insolvent corporation, to allow as a just set-off, the amounts claimed by Hudson Builders Material Corporation and Washburn Brothers Co., Inc., as due to them respectively for materials supplied by them respectively to the said insolvent corporation, Murray-Nutz, Inc., in connection with the contract mentioned in the said Petition, as against the amount claimed by the said Receiver from the said Petitioner;

It is, on this 14th day of April, 1930, on motion of Marshall Van Winkle, solicitor for and of counsel with the petitioner A. W. Crone & Son, Inc., ORDERED, that Martin J. Monahan, Jr., Receiver herein, show cause before the Chancellor, at the Chancery Chambers, No. 1 Exchange Place, in Jersey City, on Monday, the 28th day of April, 1930, why the amounts due said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., as mentioned in the said Petition, should not be allowed as a just set-off that should be made according to law and equity, as against the amount claimed by said Receiver from the petitioner, as mentioned in the said Petition; and why the said Receiver should not be ordered to make such set-off upon petitioner actually paying the said amounts so claimed by said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc., and supplying and delivering to the said Receiver receipts signed by the said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., showing the petitioner has actually paid such sums to said Hudson Builders Material Corporation and to Washburn Brothers Co., Inc., respectively;

And Further ORDERED, that the petitioner serve

*Answer to Petition.*

copies of this Petition and of this Order, which copies need not be certified, on the solicitor of the said Receiver, within four days from the date hereof.

E. R. WALKER,  
C. 10

Respectfully Advised:

J. O. BIGELOW,  
V.-C.

**Answer to Petition.**

(Filed May 19, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corp.,  
*Defendant.*

76/583.  
On Bill, &c.  
Answer to Peti-  
tion of A. W.  
Crone & Son,  
Inc.

20

Answering the petition of A. W. Crone & Son, Inc., a corporation of the State of New Jersey, the Receiver of the above-named defendant corporation, respectfully shows that:

1. Paragraph 1 of the petition is admitted.
2. The Respondent has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the petition, and therefore neither admits nor denies the same, but put the petitioner to its proof.

30

40

*Answer to Petition.*

3. Paragraph 3 of the petition is admitted.

4. Paragraph 4 of the petition is admitted.

10 5. Respondent has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the petition, and therefore neither admits nor denies the same, but put the petitioner to its proof.

6. The allegations of paragraph 6 are admitted, except that part which states "or needs to be paid to the person, firms and corporations that supplied materials to said Nutz & Reier, George K. Nutz, Inc., and Murray-Nutz, Inc., in connection with said work for the account of said Murray-Nutz, Inc.," which is denied.

20

7. Paragraph 7 of the petition is denied.

8. Paragraph 8 of the petition is denied.

9. Paragraph 9 of the petition is denied, and your Respondent further says that the said Hudson Builders Material Corporation has not, and did not, within the time prescribed by an order made by this Honorable Court in this cause file any proof of claim whatever with this Respondent claiming or asserting to have a claim for any materials delivered by it to the defendant insolvent corporation.

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10. Paragraph 10 of the petition is denied, and your Respondent further says that the said Washburn Brothers Co, Inc., has not and did not within the time prescribed by an order made by this Honorable Court in this cause file any proof of claim whatever with this Respondent claiming, or asserting to have a claim for any materials delivered by it to the defendant insolvent corporation.

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11. Paragraph 11 of the petition is admitted.

*Affidavit of Receiver.*

12. Paragraph 12 of the petition is denied.
13. Paragraph 13 of the petition is denied.
14. Paragraph 14 of the petition is denied.
15. Paragraph 15 of the petition is denied.
16. Paragraph 16 of the petition is denied. 10
17. Paragraph 17 of the petition is denied.
18. Paragraph 18 of the petition is denied.

CHAS. RUBENSTEIN,  
Solicitor of Receiver  
Martin J. Monahan, Jr.

**Affidavit of Receiver.**

(Filed .) 20

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

On Bill, &c.  
Affidavit of  
Receiver.

30

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

MARTIN J. MONAHAN, JR., of full age, being duly sworn upon his oath deposes and says:

1. I am the Receiver of the above defendant corporation. 40
2. Paragraph 1 of the petition is admitted.

*Affidavit of Receiver.*

3. I have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the petition, and therefore neither admit nor deny the same, but put the petitioner to its proof.

10

4. Paragraph 3 of the petition is admitted.

5. Paragraph 4 of the petition is admitted.

6. I have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the petition, and therefore neither admit nor deny the same, but put the petitioner to its proof.

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7. The allegations of paragraph 6 are admitted, except that part which states "or needs to be paid to the person, firms, and corporations that supplied materials to said Nutz & Reier, George K. Nutz, Inc., and Murray-Nutz, Inc., in connection with said work for the account of said Murray-Nutz, Inc.," which is denied.

8. Paragraph 7 of the petition is denied.

9. Paragraph 8 of the petition is denied.

30

10. Paragraph 9 of the petition is denied, and I further say that the said Hudson Builders Material Corporation has not, and did not, within the time prescribed by an order made by this Honorable Court in this cause file any proof of claim whatever with me claiming or asserting to have a claim for any materials delivered by it to the defendant insolvent corporation.

40

11. Paragraph 10 of the petition is denied, and I further say that the said Washburn Brothers Co., Inc., has not, and did not, within the time prescribed by an order made by this Honorable Court in this cause file any proof of claim whatever with me claiming or asserting to have a claim for any

*Amended Petition.*

materials delivered by it to the defendant insolvent corporation.

12. Paragraph 11 of the petition is admitted.
13. Paragraph 12 of the petition is denied.
14. Paragraph 13 of the petition is denied. 10
15. Paragraph 14 of the petition is denied.
16. Paragraph 15 of the petition is denied.
17. Paragraph 16 of the petition is denied.
18. Paragraph 17 of the petition is denied.
19. Paragraph 18 of the petition is denied.

MARTIN J. MONAHAN, JR.

Sworn to and subscribed before me } 20  
 this 17th day of May, 1930. }

DAVID BEERMAN,  
 Justice of the Peace.

**Amended Petition.**

(Filed June 16, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76-583.  
 On Bill, &c.  
 Amendment to  
 Petition of  
 A. W. Crone &  
 Son, Inc.

30

40

The Petition of A. W. Crone & Son, Inc., filed April 14th, 1930, is hereby amended by adding

*Amended Petition.*

two paragraphs on page 5 of said Petition at the foot of said page 5, as follows:

10           16a. Said Hudson Builders Material Corpora-  
tion and said Washburn Brothers Co., Inc., respec-  
tively furnished the surety on the said bond so  
executed by petitioner and Fidelity and Deposit  
Company of Maryland, as aforesaid, within eighty  
(80) days after the acceptance of the construction  
of the said building mentioned in the said contract  
so made by petitioner with the State of New Jersey,  
represented by the State Board of Education, a  
statement of the amounts due to them respectively,  
namely, \$6,331.86 in the case of said Hudson  
Builders Material Corporation, and \$452.85 in the  
20           case of said Washburn Brothers Co., Inc. Said  
Hudson Builders Material Corporation and said  
Washburn Brothers Co., Inc., respectively gave no-  
tice and furnished a statement in accordance with  
the provisions of the Statute in such case made  
and provided. The building was accepted by the  
State on March 27th, 1930.

30           16b. Petitioner has paid to said Hudson Build-  
ers Material Corporation the said sum of \$6,331.86,  
and to said Washburn Brothers Co., Inc., the said  
sum of \$452.85, and petitioner paid the same for  
the account of the above-named defendant and  
pursuant to the obligation of the said bond and  
the provisions of the Statute in such case made  
and provided.

A. W. CRONE & SON, INC.,  
Petitioner.

MARSHALL VAN WINKLE,  
Solicitor and of Counsel  
with Petitioner.

40

(Filing of this Petition consented to.)

*Consent to File Amended Petition.*

STATE OF NEW JERSEY, }  
 HUDSON COUNTY, } ss.:

JOSEPH A. CRONE, of full age, being duly sworn on his oath doth depose and say:

I am the Secretary of A. W. Crone & Son, Inc, 10  
 the petitioner in the foregoing Amendment to Petition.

The facts, matters and things therein stated are true.

JOSEPH A. CRONE.

Subscribed and sworn to before me }  
 this Third day of June, 1930. }

MARSHALL VAN WINKLE, JR., 20  
 (Seal) Notary Public  
 of New Jersey.

**Consent to File Amended Petition.**

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76-583. 30  
 On Bill, &c.  
 On Amendment to  
 Petition of  
 A. W. Crone &  
 Son, Inc.  
 Consent.

It is consent ed that the Petition of A. W. Crone & Son, Inc., filed April 14th, 1930, may be amended 40

*Answer to Amended Petition.*

as hereinafter stated, and that an Order to accomplish such Amendment may be entered.

Dated June 3d, 1930.

10

CHARLES RUBENSTEIN,  
Solicitor of Martin J. Monahan, Jr.,  
Receiver.

**Answer to Amended Petition.**

(Filed June 9, 1930.)

IN CHANCERY OF NEW JERSEY.

20

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76/583.

On Bill, &c.

Answer to Amendment to Petition of A. W. Crone & Son, Inc.

30

Answering the amendment to the petition heretofore filed on April 14th, 1930, Martin J. Monahan, Jr., Receiver of the above-named defendant corporation, says that:

40

16-A. The allegations of paragraph 16-A are admitted, but this Respondent says that giving of notice and the furnishing of a statement by the Hudson Builders Material Corporation and Washburn Brothers Co., Inc., is not binding on this Respondent, in that the said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., were duly served in the manner and form provided by the rules and orders of the court with

*Answer to Amended Petition.*

a copy of the order issued out of and under the seal of this court dated January 13th, 1930, wherein, among other things, it was ordered "that all persons, stockholders of the defendant corporation, and firms or corporations, including sheriffs and marshals, and their officers, agents, attorneys, representatives, servants and employees, whether creditors or claiming to be creditors, or having or claiming to have, any right, title or interest of, in and to any property or properties of the defendant, be and they are hereby enjoined and restrained from instituting or prosecuting, or continuing the prosecution of any action at law, or action or proceeding in equity before any association, organization or arbitration board, or committee, referee, umpire or other court or tribunal, of any association or organization, or otherwise, or from executing or issuing, or causing the execution or issuance, or the issuing out of any court of any writ, process, summons, attachment, subpoena, replevin, or any other proceeding for the purpose of empounding, or taking the possession of or interfering with any property owned by or in the possession of the said defendant corporation, or the said receiver, or owned by the said defendant corporation, and in the possession of any officers, agents, servants, attorneys or representatives of the said defendant corporation, or of any other person, party, firm or corporation, and all persons, parties, firms and corporations, including the defendant corporation, and their representatives, agents, attorneys and servants, and all sheriffs, marshals and other officers, and their deputies, representatives and servants, are hereby enjoined and restrained from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or

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*Answer to Amended Petition.*

10 in any way interfere with any property, assets or effects in the possession of the said defendant corporation, and in the possession of any officers, agents, attorneys or representatives of said defendant, or of any other person, party, firm or corporation, and from doing any act whatsoever to interfere with the possession and management by said receiver of the properties of the defendant corporation, or in any way to interfere with the said receiver in the discharge of his duties or to interfere in any way with the administration and disposition of this suit of the affairs and properties of the defendant corporation." The above creditors did not obtain leave of the court of Chancery to prosecute their claims with the surety company as set forth in the amendment to the petition.

20

16-B. For the purposes of this proceeding your Respondent does admit the allegations of paragraph 16-B, but says that the said payments are not binding upon this Respondent and were voluntary payments on the part of the petitioner.

30 CHAS. RUBENSTEIN,  
Solicitor of Martin J. Monahan,  
Jr., Receiver of Murray-Nutz,  
Inc., insolvent corp.

STATE OF NEW JERSEY, )  
HUDSON COUNTY,        ) SS.:

MARTIN J. MONAHAN, JR., of full age, being duly sworn upon his oath deposes and says:

I am the Receiver of the above defendant cor-

40

*Affidavit of Petitioner.*

poration, and the facts, matters and things therein stated are true.

MARTIN J. MONAHAN, JR.

Subscribed and sworn to before me }  
 this 7th day of June, 1930. } 10

JENNIE WANDINSKI,  
 Notary Public  
 of New Jersey.

**Affidavit of Petitioner and Exhibits, Covered  
 by Stipulation.**

(Filed June 16, 1930.) 20

IN CHANCERY OF NEW JERSEY.

Between  <p style="text-align: center;">GEORGE K. NUTZ,  <i>Complainant,</i></p> <p style="text-align: center;">and</p> <p style="text-align: center;">MURRAY-NUTZ, INC., a corporation,  <i>Defendant.</i></p>	76-583. On Bill, &c. On Petition and Amended Peti- tion of A. W. Crone & Son, Inc., and An- swers thereto of the Receiver. Affidavit.	30
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State of New Jersey, }  
 Hudson County, } ss.:

ANTHONY W. CRONE, being by me duly sworn on his oath doth depose and say:

1. I am the President of the Petitioner, A. W. Crone & Son, Inc.
2. Petitioner entered into an Agreement with the State of New Jersey, represented by the State 40

*Affidavit of Petitioner.*

10 Board of Education, dated October 13, 1928, for the  
construction by Petitioner of a building, namely,  
the Second Section of the State Normal School, on  
the Boulevard, Jersey City, New Jersey, for the  
sum of \$415,189; and petitioner, as principal, and  
Fidelity and Deposit Company of Maryland, as  
Surety, entered into a bond for the performance  
of said Agreement, executed and with condition in  
accordance with the provisions of the Statute, and  
said bond was duly approved, deposited and filed  
with the said State Board of Education, as provided  
by the Statute, (*Laws of 1918 and 1920. Pam.  
Laws 1918 p. 205. Laws 1920 p. 243*), the said  
bond being conditioned for the payment by Peti-  
20 tioner, and by all sub-contractors of all indebted-  
ness which might accrue to any person, firm or  
corporation, on account of any labor performed or  
materials furnished in the construction of such  
building. A copy of said bond is hereto annexed  
and marked "*Bond.*"

30 3. The insolvent corporation entered into an  
Agreement with Petitioner, as a sub-contractor, for  
certain plastering work on the said building to be  
constructed by the Petitioner for the State pursu-  
ant to said Agreement so made by Petitioner with  
the State, a copy of which agreement is annexed  
hereto marked "*Agreement*", and materials were  
supplied by materialmen, namely, Hudson Build-  
ers Material Corporation and Washburn Brothers  
Co., Inc., to the defendant insolvent corporation,  
sub-contractor as aforesaid, in connection with the  
Agreement so made by defendant insolvent corpo-  
ration and Petitioner, and in the construction of  
the said building.

40 4. At the time the Receiver was appointed here-  
in, there was due from the defendant to said Hud-

*Affidavit of Petitioner.*

son Builders Material Corporation, the sum of \$6,331.86, and to said Washburn Brothers Co., Inc., the sum of \$452.85, respectively, for materials so supplied by them respectively to the defendant in the said construction, which sums have not been paid by the defendant corporation, or the Receiver, in whole or in part. 10

5. A Statement of Account is appended hereto and made a part hereof, marked "*Statement of Account*," which shows the payments made on account of said Agreement by Petitioner to the defendant before the appointment of the Receiver, and amounts paid by Petitioner to others supplying material or doing work on said building, under the said agreement so made by defendant, on the written orders of the defendant. 20

6. Petitioner paid sums of money as follows to the defendant corporation on account of the Agreement so made by the defendant with Petitioner, namely:

Aug. 2/29 to Nutz Co.....	\$2,000.00	
28/29 " .....	2,000.00	
Sept. 18/29 " .....	2,000.00	
26/29 " .....	2,000.00	
Oct. 4/29 " .....	3,000.00	30

Petitioner paid to Decorative Supply Co., on the written order of defendant, \$1,000.00.

Petitioner paid to Maxfield Keck, on the written order of defendant, \$700.

Petitioner also paid to the defendant, December 13, 1929, on account of said Agreement, \$200.

7. Copies of the written orders of defendant to pay to third parties as aforesaid, who had supplied material or done work for the defendant, under 40

*Affidavit of Petitioner.*

the said agreement so made by defendant, are annexed hereto and made a part hereof, the same being marked "*Orders.*"

10 8. At the time of the appointment of the Receiver herein, there was due from the Petitioner to the defendant, \$6,517.27, on the said agreement so made by Petitioner with the defendant.

20 9. Prior to the appointment of the Receiver, said Hudson Builders Material Corporation and said Washburn Brothers Co., Inc., served notices of demand on Petitioner and made demands on Petitioner, demanding that Petitioner pay to them respectively, said sums of \$6,331.86 and \$452.85, so due by defendant for materials supplied by them respectively to defendant. Copies of the said written notices of demand are annexed hereto marked "*Demands.*"

10. At the time of the appointment of the Receiver, the work to be done by the defendant under its said Agreement was not completed.

30 11. The building to be constructed was accepted by the State of New Jersey subsequently to the appointment of the Receiver.

40 12. Said Hudson Builders Material Corporation and Washburn Brothers Co., Inc., respectively furnished Statements to the said Fidelity and Deposit Company of Maryland, in accordance with the said Statute, after the acceptance of said building; and said notices demanded that said Fidelity and Deposit Company of Maryland pay to them respectively, the said sums of \$6,331.86 and \$452.85, due them as aforesaid, for materials supplied by them respectively, to the defendant, said Statements so furnished showing these amounts as being due re-

*Bond.*

spectively. Copies of these Statements furnished are annexed hereto marked "*Statements Furnished.*"

13. The Receiver instituted an action at law against Petitioner for the said amount of \$6,517.27, which action is still pending. Petitioner interposed an Affidavit of Merits. 10

14. Petitioner has paid the said sum of \$6,331.86 to said Hudson Builders Material Corporation, and said sum of \$452.85, to Washburn Brothers Co., Inc.

ANTHONY W. CRONE

Subscribed and sworn to before me }  
this Ninth day of June, 1930. }

M. VAN WINKLE, JR.,

(Seal) Notary Public of New Jersey.

**Bond.**

KNOW ALL MEN BY THESE PRESENTS, that, we the Undersigned, A. W. CRONE & SON, a corporation of the State of New Jersey, with principal office at 338 Palisade Avenue, in the City of Jersey City, County of Hudson, State of New Jersey, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, with principal offices at Charles & Lexington Streets, in the City of Baltimore, State of Maryland, authorized to do a surety business in the State of New Jersey, as Surety, are held and firmly bound unto the State of New Jersey in the penal sum of FOUR HUNDRED FIFTEEN THOUSAND ONE HUNDRED EIGHTY-NINE AND No/100 (\$415,189.00) DOLLARS, for the payment of 30 40

*Bond.*

which well and truly to be made, we hereby jointly and severally bind ourselves, our and each of our heirs, executors, administrators, successors, and assigns.

Signed this 13th day of October 1928.

10

The condition of the above obligation is such that whereas, the above named principal did on the thirteenth day of October 1928 enter into a contract with the State of New Jersey represented by the State Board of Education for the performance of the General Construction work, complete, including Alternative Estimate #2, for simplifying the Auditorium windows; Alternative Estimate #4-A, for simplifying entrance lobbies; and Alternative Estimate #4-B, for using wood windows instead of steel for the completion of the State Normal School, on the site provided, on Hudson Boulevard at Culver Avenue, Jersey City, N. J., which said contract is annexed thereto.

20

30

NOW, THEREFORE, if the said A. W. CRONE & SON shall well and faithfully do and perform the things agreed with the State of New Jersey to be done and performed according to the terms of said contract, and shall pay all lawful claims of sub-contractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any material man or laborer having a just claim, as well as for the obligee herein, then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all

40

*Bond.*

claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omissions or additions in, from or to the terms of the said contract or in or to the drawing and specifications heretofore mentioned shall in any wise affect the obligation of said surety on its bond. 10

A. W. CRONE & SON, INC.,  
Per A. W. CRONE  
Pres.

JOSEPH A. CRONE, Sec.

(Seal)

FIDELITY AND DEPOSIT COMPANY 20  
OF MARYLAND  
By CLARENCE W. NAUMANN  
Attorney in Fact

(Seal)

Attest

EULULIA WILLEAU  
Attorney in Fact.

(Seal) 30

Countersigned and issued in the  
State of New Jersey at

By  
VINCENT P. CAHILL  
Registered Resident Agent.

**Agreement.**

Telephone Palisade 9330.

NUTZ AND REIER  
PLASTERING CONTRACTORS  
988 Bergenline Avenue  
Union City, N. J.

10

October 1, 1928.

A. W. Crone & Son, Inc.,  
338 Palisade Ave.,  
Jersey City, N. J.

Re:—State Normal School  
Jersey City, N. J.

Gentlemen:

20

We propose to furnish labor and material for the plain and ornamental plastering including metal furring, lathing, corner beads, scaffold, etc., as per plans and specifications of the Architect for the sum of TWENTY SIX THOUSAND DOLLARS (\$26,000.00).

Alternate #1—for omitting tower, deduct the sum of SEVEN HUNDRED DOLLARS (\$700.00).

No temporary heating, lighting, or removal of rubbish is included in this estimate.

30

Very truly yours,

NUTZ & REIER  
Geo. K. Nutz

N:C

40

*Agreement.*

Telephone Palisade 9330.

NUTZ AND REIER  
PLASTERING CONTRACTORS  
988 Bergenline Avenue  
Union City, N. J.

10

November 20, 1928.

A. W. Crone & Son, Inc.,  
338 Palisade Ave.,  
Jersey City, N. J.

Re: State Normal School  
Jersey City, N. J.

Gentlemen:

We beg to submit our revised figure for the plain and ornamental plastering including metal furring, lathing, etc., and propose to furnish labor and material for same as per plans and specifications of the Architect for the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00).

20

No scaffold over 16 ft., temporary heating, lighting, or removal of rubbish is included in this estimate.

Yours truly,

NUTZ & REIER  
Geo. K. Nutz

30

N:C

40

*Agreement.*

Telephone Palisade 9330.

GEO. K. NUTZ, INC.  
PLASTERING CONTRACTORS  
988 Bergenline Avenue  
Union City, N. J.

10

Aug. 22—1929.

Messrs. A. W. Crone & Sons  
338 Palisade Ave.  
Jersey City, N. J.

RE: STATE NORMAL SCHOOL

Dear Sirs:

20 We herewith assign contract with M. J. Monahan  
covering Metal Furring, Lathing, Corner Beads etc.  
on the State Normal School amounting to \$5300.  
to you, which amount kindly deduct from our con-  
tract amounting to \$25000. making the amount of  
our contract with you now \$19,700.00.

Thanking you in advance, we remain

Yours very truly,

GEO. K. NUTZ INC

By: GEO. K. NUTZ Pres.

GKN/DA

30

Accepted August 23rd 1929

A. W. CRONE & SON, INC.,  
by JOSEPH A. CRONE.

*Agreement.*

TROY METAL LATH CO.

M. J. MONAHAN  
264 Post Avenue  
Lyndhurst, N. J.

Aug. 22—1929.

A. W. Crone & Son  
338 Palisade Ave.  
Jersey City, N. J.

10

## STATE NORMAL SCHOOL

We propose to furnish and erect the Iron Furring and Metal Lathing on the above building for the sum of Fifty-three Hundred \$5300.00 corner beads are included.

The erection of work and furnishing of materials on the above building will be in compliance with the plans and specifications of the architect.

20

The scaffolding for erection of work will be furnished, erected and sheated by plaster or general contractor.

Yours very truly,

TROY METAL LATH CO.  
M. J. MONAHAN, JR.

MJM/DA

30

40

**Statement of Account.**

A. W. CRONE & SON, INC.  
BUILDERS

338 PALISADE AVENUE  
JERSEY CITY, N. J.

Telephone Webster 4283

January 10, 1930.

10

## STATEMENT OF ACCOUNT.

Nutz & Reier,  
Geo. K. Nutz Inc.  
Murray & Nutz Inc.  
988 Bergenline Ave.,  
Union City, N. J.

20

Accepted revised estimate dated Nov. 20, 1928...	25000.00
M. J. Monahan estimate for metal furring, lathing etc., deducted from Geo. K. Nutz Inc., contract .....	5300.00
	<u>19700.00</u>

(15% retained [\$2995.00])

*Paid to date*

30

Aug. 2/29 to Nutz .....	2000.00
28/29 " .....	2000.00
Sept. 18/29 " .....	2000.00
26/29 " .....	2000.00
Oct. 4/29 " .....	3000.00
Dec. 4/29 Decorative Supply Co., on account as per order attached .....	1000.00
Maxfield Keck on account as per order attached .....	700.00
13/29 .....	200.00
	<u>12900.00</u>

Balance due not including 15% to be retained .....	6800.00
	<u><u>6800.00</u></u>

40

A. W. Crone & Son, Inc. for waterproofing as agreed .....	400.00
Decorative Supply Co., Balance due	525.00
Maxfield Keck, Balance due .....	100.00
Hudson Builders Material Corp..	6331.86
Washburn Bros. Co. ....	452.85
	<u><u>7809.71</u></u>

**Orders.**

Telephone Palisade 9330.

GEO. K. NUTZ, INC.  
PLASTERING CONTRACTORS  
988 Bergenline Avenue  
Union City, N. J.

10

Nov. 22—1929.

Messrs. A. W. Crone & Son,  
338 Palisade Ave.  
Jersey City, N. J.

STATE NORMAL SCHOOL

Dear Sirs:

Referring to our contract with you for Plastering on the above building, we herewith authorize you to pay to Maxfield Keck of 444 W. 33rd St., New York City, the sum of—Seven Hundred Dollars (\$700.00), same shall be credited to and deducted from future payments payable on this building.

20

Yours very truly,

MURRAY-NUTZ INC.

By: James G. Murray

DA

30

40

*Order.*

Telephone Palisade 9330.

GEO. K. NUTZ, INC.  
PLASTERING CONTRACTORS  
988 Bergenline Avenue  
Union City, N. J.

10

Dec. 2—1929.

Messrs. A. W. Crone & Son  
Jersey City, N. J.

STATE NORMAL SCHOOL

Dear Sirs:

20

Referring to our contract with you for Plastering on the above building, we herewith authorize you to pay to—Decorative Supply Co. of 425—13th St. Union City, N. J., the sum of—One Thousand Dollars (\$1000.00) same shall be credited to and deducted from future payments payable on this building.

Yours very truly,

MURRAY-NUTZ, INC.  
By Geo. K. Nutz Pres.

30

40

**Demands.**

HUDSON-BUILDERS' MATERIAL CORP.

Dealers in  
MASONS' BUILDING MATERIALS  
Labor Bank Building  
Jersey City, N. J.

10

October 21, 1929.

A. W. Crone & Son,  
338 Palisade Avenue,  
Jersey City, N. J.

Gentlemen:

This will serve to notify you that there is due us from George K. Nutz, Inc., the sum of \$5345.35 for material delivered at the St. Normal School job, Jersey City.

20

We would ask that you please retain this sum from any money due or to become due to him in connection with the job mentioned above.

Thanking you, we are

Very truly yours,

HUDSON BUILDERS' MATERIAL CORP.

Per—I B Scan Jr

Treasurer

IBS:VC

30

A. W. Crone & Son,  
338 Palisade Avenue,  
Jersey City, N. J.

You are hereby notified that George K. Nutz, Inc., one of the sub-contractors is justly indebted to Washburn Brothers Company in the sum of Four Hundred Fifty-two Dollars and Eighty-five Cents (\$452.85), for materials furnished by it to them and used in the erection of the brick school building on the land owned by the State of New

40

*Statements Furnished.*

Jersey and situated on the west side of Hudson County Boulevard between Audubon Avenue and Broadman Parkway, in the City of Jersey City, Hudson County, New Jersey, pursuant to the written contract made between A. W. Crone & Son and George K. Nutz, Inc., and on file in the Hudson County Clerk's Office; and you are further notified that Washburn Brothers Company has demanded payment from the said George K. Nutz, Inc. of said sum of money so due and owing to it, the said Washburn Brothers Company aforesaid, and that the said George K. Nutz, Inc. has refused to pay the same or any part thereof; and you are, therefore, required to retain the amount so due and claimed by Washburn Brothers Company out of the amount owing by you to the said George K. Nutz, Inc., or that may hereafter become due and owing on said contract from A. W. Crone & Son to George K. Nutz, Inc. and, on being satisfied of the correctness of the demand of said Washburn Brothers Company to pay the same to the said Washburn Brothers Company.

WASHBURN BROTHERS COMPANY

By E. D. Wetmore  
Assistant Treasurer.

Dated December 9th, 1929.

**Statements Furnished.**

(Here follow statements furnished in accordance with the Statute, of Hudson Builders Material Corporation to the amount of \$6,331.86 and of Washburn Bros. Co. to the amount of \$452.85, the same showing items supplied and dates when supplied and prices.)

**Stipulation.**

(Filed June 16, 1930.)

## IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76-583.

On Petition of  
A. W. Crone &  
Son, Inc., and  
Answers thereto.  
Stipulation.

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It is stipulated and agreed that the Affidavit of Anthony W. Crone, dated June 9th, 1930, may be used as evidence of the facts therein set forth, with the same force and effect as if competent witnesses had testified to said facts in the Court of Chancery on a hearing of the Petition and Amended Petition of A. W. Crone & Son, Inc., Petitioner, and the Answers of Receiver thereto.

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Dated June 9, 1930.

CHARLES RUBENSTEIN,  
Solicitor of Receiver.

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MARSHALL VAN WINKLE,  
Solicitor of Petitioner.

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**Affidavit of Receiver.**

(Filed July 15, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

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GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation  
of the State of N. J.,  
*Defendant.*

76/583.

Affidavit.

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State of New Jersey, }  
County of Hudson, } ss.:

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MARTIN J. MONAHAN, JR., being duly sworn upon his oath, deposes and says that he is the Receiver in the above-entitled matter; that up to the date of June 2nd, 1930, no payment was made by A. W. Crone & Son, to Washburn Brothers, Inc., and Hudson Builders Material Corporation. That if any payment was made to these people the same was made after the said date of June 2nd, 1930. The suit of Martin J. Monahan, Jr., Receiver of Murray-Nutz, Inc., against A. W. Crone & Son, a corporation of New Jersey, was instituted on the 2nd day of April, 1930.

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The petition of A. W. Crone & Son, Inc., for a set-off was filed in this Court on April 14th, 1930.

Deponent further says that the said Hudson Builders Material Corporation and Washburn Brothers, Inc., did not file claims with the Receiver, although they were served in the manner and form provided by the orders of the Court with a copy

*Order or Decree.*

of a notice requiring each of them to file their claims with the Receiver.

MARTIN J. MONAHAN, JR.

Sworn to and subscribed before me }  
 this 11th day of July, 1930. } 10

(Seal) JACOB LEVINE,  
 Notary Public of N. J.

**Order or Decree.**

(Filed October 1, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

76/583.  
 On Bill, &c.  
 On Petition of  
 A. W. Crone &  
 Son, Inc., for a  
 Set Off.  
 Order.

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This matter was opened to the Court by Marshall Van Winkle, Esquire, Solicitor of the Petitioner, on a petition and an amended petition of A. W. Crone & Son, Inc., and an order to show cause issued thereon dated April 14th, 1930, why the amounts due to the Hudson Builders Material Corporation and Washburn Bros. Co., Inc., as due to them, respectively, for materials supplied by them to the said insolvent corporation in connection with the contract mentioned in the said petitions should not be allowed as a just set-off as

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*Order or Decree.*

10 against the amount claimed by the said Receiver from the petitioner as mentioned in the said petitions, and on the answers and affidavits filed by the Receiver herein and after considering the said pleadings and affidavits and briefs of counsel, there appears sufficient reason to affirm the action of the Receiver in disallowing the set-offs, and in adjudging that the claim of the petitioner set forth in the petitions cannot be set-off against its debt upon which the Receiver has brought suit.

20 It is thereupon on this 1st day of October, 1930, on application of Chas. Rubenstein, Solicitor of Receiver herein, ORDERED, ADJUDGED and DECREED, that the action of the Receiver in disallowing the set-off claimed by the petitioner herein, be and the same is hereby affirmed; and

It is further ORDERED, ADJUDGED and DECREED that the claim of the petitioner set forth in the petitions cannot be set-off against its debt upon which the Receiver has brought suit.

Respectfully advised,

J. O. BIGELOW,  
V.-C.

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**Opinion.**

## IN CHANCERY OF NEW JERSEY.

Between

GEORGE K. NUTZ,  
*Complainant,*

and

MURRAY-NUTZ, INC., a corporation,  
*Defendant.*

On Bill, &c.  
Memorandum.  
76/583.

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September 10, 1930.

On petition of A. W. Chrone &amp; Son, Inc.

MR. MARSHALL VAN WINKLE, for Petitioner.

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MR. CHARLES RUBENSTEIN, for Martin J.  
Monahan, Jr., Receiver.

(This memorandum is not to be published in the  
official or unofficial reports.)

## MEMORANDUM.

BIGELOW, V-C.:—

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On October 13, 1928, the petitioner, A. W. Chrone & Son, Inc., entered into a contract with the Board of Education of the State of New Jersey, whereby petitioner agreed to construct an addition to the State Normal School in Jersey City. At the same time, petitioner and Fidelity & Deposit Company of Maryland entered into a bond to the State upon the condition that the petitioner should "pay all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials fur-

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*Opinion.*

nished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialmen or laborers having a just claim."

10       A month or so thereafter the defendant, Murray-Nutz, Inc., agreed with the petitioner to do the plastering work as a sub-contractor.

      On January 13, 1930, the defendant was adjudged to be insolvent and Mr. Monahan was appointed receiver by this Court. At that time the defendant was indebted to Hudson Builders Material Corporation and to Washburn Bros. Co., Inc., respectively, for \$6,331.86 and \$452.85 for materials furnished in the erection of the Normal School in accordance with the contract between petitioner and  
20       the State Board of Education.

      The building was accepted by the State on March 27, 1930. At about the same time, the receiver instituted an action at law in the Hudson County Circuit Court against the petitioner for \$6,517.27, the unpaid balance of the contract price stated in the agreement between petitioner and defendant. Petitioner then or even before the action was  
30       brought, requested the receiver to allow as a set-off the amounts due by defendant to the materialmen. The receiver refused so to do. Within thirty days thereafter, namely, on April 14, 1930, the petitioner filed in this Court its petition setting up the foregoing facts and praying that the receiver be directed to allow to petitioner as a set-off the sum of \$6,784.71, due by defendant to the materialmen. This set-off would more than satisfy receiver's claim against petitioner.

40       On June 10, the petition was amended so as to set forth that within eighty days after the accep-

*Opinion.*

tance of the building, the Hudson Builders Material Corporation and Washburn Bros. Co., Inc., respectively, furnished to the Fidelity & Deposit Company of Maryland, statements of the amounts due them in accordance with the statute herein-  
 after stated and demanded that the Fidelity & Deposit Company pay to them respectively the sums above mentioned due them for materials furnished to the defendant. Petitioner thereafter paid to the materialmen the sums due them. 10

The receiver has answered denying that petitioner is entitled to a set-off; the facts are not in dispute.

Counsel for the petitioner asserts that this Court has jurisdiction over the controversy, first, because the receiver is an officer of this Court and subject to its direction, and, second, because the statute under which the receiver was appointed gives to any aggrieved person a right to appeal to the court from a determination of the receiver. 20

It is doubtless true that the receiver is subject to the supervision and control of the court. (*Denver City Water Works v. American Water Works*, 88 A. 1052.) But on the other hand, it must be remembered that the receiver is a "statutorily created trustee." (*Girard Trust Co. v. Standard Gas Co.*, 93 N. J. Eq. 307.) "The receivers derive their power wholly from the statute under which they were appointed." (*Runyon v. Farmers & Mechanics Bank*, 4 N. J. Eq. 480.) The powers of the receiver are set forth in "An Act Concerning Corporations (Revision of 1896)," Section 66, C. S. 1643. The court should not substitute itself for the receiver in the exercise of the powers so conferred. In a controversy between the receiver and another, the proceedings should be so moulded 30  
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*Opinion.*

that not only the receiver, but his adversary will be concluded by the decision of the court.

10 Section 78 of the same statute, as amended by P. L. 1913, p. 409, provides: "Any person ag-  
grieved by the proceedings or determination of  
such receiver in the discharge of his duty, may  
appeal to the Court of Chancery within thirty days  
after notice of such proceedings or determination,  
or such further time as the Chancellor may allow,  
which court shall, in a summary way, hear and de-  
termine the matter complained of and make such  
order touching the same as shall be equitable and  
just." This section has been very liberally inter-  
preted. In *Suydem v. Receivers*, 3 N. J. Eq. 114,  
20 a vendee under a contract for the sale of real estate made by the insolvent company, tendered to the receiver the contract price and demanded a deed. The receivers disaffirmed the contract and refused to deliver the deed. From this determination of the receivers, the vendee appealed to the Chancellor and the appeal was decided upon the merits. Another phase of the same case came before the court in 3 N. J. Eq. 276. After the vendee was defeated in the first appeal, he made an offer in compromise to the receivers and upon their re-  
30 jection of his offer he again appealed to the Chancellor, and again the appeal was entertained and the decision of the receivers affirmed.

The facts in *Jackson v. Peoples Bank*, 9 N. J. Eq. 205, were almost identical with those now before the court. The receivers held a promissory note on which they proposed to sue the maker. The maker claimed a set-off which the receivers refused to allow. From this determination, the  
40 maker of the note appealed. Chancellor Williamson held that the appeal was within the statute.

*Opinion.*

“The language of the seventeenth section of the Act (now Section 78) is very comprehensive and would seem to have been adopted for the purpose of embracing every question which could possibly be brought before the receivers for their action, and by which action any person could complain of being aggrieved.” He also outlined the practice which has been substantially followed in this case,—petition, answer and final hearing—and found that the decision on the appeal would be conclusive. He wrote “Jackson and McGinnis by this appeal have submitted to the jurisdiction of the Chancellor under the statute, and the Chancellor being vested by the Act, in the execution of the powers and authority conferred by it, with all the jurisdiction and power which is lawful for the Court of Chancery to exercise in suits depending in the court, will so mould the proceedings as to make the decision binding and conclusive on all parties, except so far as that decision may be subject to an appeal to a higher tribunal.” To the same effect is *Ellison v. Gray*, 55 N. J. Eq. 581, 37 A. 1018. “The statute conferring the right of appeal from the decision of the receiver primarily clothed with power to decide manifestly contemplated that the result should be conclusive. It is final in its nature, disposing of the whole merits of the case, leaving nothing for further examination or judgment.”

No particular form for taking the appeal is prescribed by the statute and the jurisdiction of the court may be appealed to by any recognized form of Chancery procedure. *Taylor v. Gray*, 59 N. J. Eq. 621, 632; 44 A. 668. Upon this appeal the court is not limited to equitable questions but may consider and decide strictly legal claims with no in-

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*Opinion.*

herent element to confer equitable jurisdiction. (*Porch v. Agnew Co.*, 72 N. J. Eq. 319, 65 A. 485.) It is unnecessary to consider whether this jurisdiction encroaches on the field of the courts of law, for it has been exercised by this court since long  
10 before our present constitution was adopted. (P. L. 1928, p. 58, Sec. 18; Elmer's Digest, p. 36.)

The court has jurisdiction of this appeal and its adjudication of the controversy will be conclusive on the parties subject, of course, to appeal to a higher court.

The only meritorious question presented on this appeal, namely, the right to a set-off, is a legal one which could be determined by the Circuit Court in the action already pending. (*Receivers v. Pater-*  
20 *son Gas Light Co.*, 23 N. J. L. 283, 296.) If the receiver had moved to dismiss the appeal, I would have been inclined to grant the motion on the ground that the law court having first acquired jurisdiction should dispose of the controversy. (*Sweeney v. Williams*, 36 N. J. Eq. 627.) But the motion was not made.

Section 66 of the Corporation Act directs the receiver "in case of mutual dealings between the corporation and any person, to allow just set-offs in  
30 favor of such person in all cases in which the same ought to be allowed according to law and equity." This provision has been interpreted in a number of cases. (*State Bank v. Receivers*, 3 N. J. Eq. 266, 271.) "The act upon which the court is now called to adjudicate does not confine itself to legal set-offs. It refers to *just* set-offs; and expressly directs the receivers to allow them when they ought to be allowed according to *law* not only, but *equity*  
40 also. It would seem from the phraseology of the statute that the Legislature had something more

*Opinion.*

in view than the general provisions of the law in regard to set-offs. It gives to receivers an equitable power and they are to exercise it according to the justice of the case."

In *Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423, the Court of Errors and Appeals held that the sections of the statute under consideration are essentially a bankrupt act, and that in the distribution of assets, the doctrines should be applied which control in bankruptcy proceedings. This does not mean, of course, that the provisions of the Federal statute relating to bankrupts, control. The intent of the Legislature of New Jersey first expressed in 1829 cannot be varied by an act of Congress adopted three-quarters of a century later. It is only the general doctrines of the bankruptcy law which are applied to the statute in question. Where the language of the Federal act and our own statute are similar, the decisions on the former may be helpful. They were followed by Vice-Chancellor Stevens in *Shields v. Shields Construction Co.*, 83 N. J. Eq. 21, where he noted that the expression "mutual dealings" in our statute is broad enough to include the phrases "mutual debts" and "mutual credits" in the national bankruptcy law and followed cases on that statute, holding that the holder of an unmatured note of the insolvent corporation could set-off the note against a debt due by him to the corporation.

It is important to ascertain the position of the parties at the time the receiver was appointed. The bond of the petitioner was executed pursuant to P. L. 1918, p. 203, as amended by P. L. 1920, p. 243, Supplement C. S. 1765. The act provides that when public buildings are to be constructed, the contracting board shall require a bond "con-

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*Opinion.*

ditioned for the payment by the contractor and by all sub-contractors of all indebtedness which may accrue to any person, firm or corporation on account of any labor performed or materials furnished in the construction" of such building. The form of the bond is set out in the statute and is the same as that executed by the petitioner and the Fidelity & Deposit Company. The statute further provides:

3. "Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm, or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, said action to be commenced within one year from the date of the acceptance of said building, work or improvement."

The statute does not permit suit on the bond until sixty days after the completion and acceptance of the building. Until that time the creditor can proceed against the principal debtor only. Even then liability on the bond is not fixed unless within eighty days after the acceptance of the building the creditor furnishes the surety on the bond a statement of the amount due by the sub-

*Opinion.*

contractor. Until the defendant company became insolvent, the petitioner had no claim against it whatever. It could not have resisted payment of the amount due defendant on the theory that defendant might not pay the materialmen and that it, the petitioner, would be called upon to pay them. 10

Did the insolvency of the defendant or the appointment of the receiver change this situation? I think not. In *Delaware, Lackawanna & Western Iron Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151, a claim was filed with the receiver of an insolvent corporation by the endorser of promissory notes who had not paid the same. Vice-Chancellor Van Fleet held that the claim should be disallowed. "As a general rule; all that the surety is entitled to against the principal debtor is indemnity; in other words, to be made whole. If he pays less than the full amount due or in depreciated currency, all he can recover is what he paid or the value of what he gives in satisfaction. \* \* \* In the present condition of affairs then, it is clear that no dividend should be paid on this claim. The endorsers have paid nothing for the makers and no part of the assets of the makers should therefore be distributed to them." 20 30

*Shields v. Shields Construction Company, supra*, does not aid petitioner. There a bank in which the insolvent company was a depositor held a note made by the insolvent and not due until after the receiver was appointed. This court held that the bank could set-off its note against its liability as depository; that the appointment of the receiver matured the note and the bank's claim became immediately provable. But the claim of petitioner could not be accelerated in this manner since it was contingent on events which might never hap- 40

*Opinion.*

pen. The petitioner had no claim against the receiver until it had paid the materialmen some time after the receiver instituted his action at law and after the petitioner had filed its original petition herein. Clearly then the petitioner had no  
10 right to a set-off when its application was made to the receiver. His determination denying the application was correct. Petitioner now urges, however, that the receiver persists in disallowing the set-off and that his decision should be reversed if on the case now made petitioner is entitled to its set-off. I do not think this suggestion can be followed. The right to a set-off must exist when the receiver is appointed, or at latest, when the day comes to plead it in the action at law, or  
20 else the right to a set-off never arises. *Morgan v. Wordell* (Mass.), 59 N. E. 1037, 55 L. R. A. 33, see also *Wagner v. Burnham* (Pa.), 73 Atl. 990. The receiver when he brought his action and when the time to answer had expired was entitled to judgment against the petitioner. That right is not defeated by the accrual thereafter of petitioner's claim.

I have not considered whether this is a case of  
30 "mutual dealings." The transaction on which the receiver sues was between the defendant and the petitioner. The other transaction, which is the subject of the set-off, was between the defendant and the two materialmen. There was no privity of dealings held between the defendant and the petitioner. Does not the statute under which the petitioner gave bond supply the mutuality? It is unnecessary for me to answer this question.

I will advise a decree affirming the action of the  
40 receiver and adjudging that the claim of the petitioner set forth in the petition cannot be set off against its debt upon which the receiver has brought suit.

## New Jersey Court of Errors and Appeals

GEORGE K. NUTZ,  
*Complainant,*

*v.*

MURRAY-NUTZ, a corporation,  
*Defendant.*

A. W. CRONE & SON, INC.,  
*Petitioner-Appellant,*

On Appeal of  
A. W. Crone &  
Son, Inc., from  
Court of  
Chancery.

### POINTS ON BEHALF OF A. W. CRONE & SON, INC.

#### The Facts.

On October 13, 1928, petitioner entered into an agreement with the State of New Jersey, for the construction of the second section of the State Normal School, on the Boulevard, in Jersey City. An agreement in writing was entered into between petitioner and Nutz & Reier, a partnership, for plastering work. This agreement passed from the partnership to a new corporation Murray-Nutz, Inc., formed March 26, 1929, being the insolvent corporation.

George K. Nutz, complainant herein, signed the original agreement with petitioner. He signed an assignment of part of the agreement with petitioner to Martin J. Monahan, Jr., who is now the Receiver of Murray-Nutz, Inc., the insolvent corporation. Monahan signed agreement with petitioner for part of the work originally to be done

by Nutz & Reier. The same George K. Nutz, as complainant herein, verified the affidavit of insolvency annexed to the bill of complaint.

Petitioner paid sums on account to defendant from time to time. Also, petitioner paid moneys to third parties to whom defendant was indebted, on the written orders of defendant, from time to time.

The work to be done by defendant was not completed at the time Receiver was appointed. Petitioner was indebted to defendant at the time Receiver was appointed in the sum of \$6,517.27. Hudson Builders Material Corp. and Washburn Brothers Co., Inc., supplied material to the defendant; and at the time the Receiver was appointed defendant owed for this material to Hudson Builders Material Corp. \$6,331.86 and to Washburn Brothers Co., Inc., \$452.85,—a total in excess of petitioner's indebtedness.

At the time petitioner entered into the agreement with the State, petitioner necessarily executed a bond in the amount of the contract, with Fidelity and Deposit Company of Maryland as surety, the bond being given pursuant to the Act of 1918 (*Pamph. Laws 1918*, p. 203), which bond was lodged with the State Board of Education. The provisions of this bond are in the words of the Statute. It provides for the payment by petitioner of all lawful claims of sub-contractors, materialmen and laborers, for labor performed and materials furnished in the construction of the building.

Before the Receiver was appointed Hudson Builders Material Corp. and Washburn Brothers Co., Inc., had demanded, and also demanded in writing that petitioner pay them respectively the sums due them respectively for the material supplied as aforesaid. Defendant was then, in fact, insolvent and unable to pay these materialmen.

After the completion and acceptance of the work, which was after the Receiver was appointed, Hudson Builders Material Corp. and Washburn Brothers Co., Inc., furnished statements to the surety on the bond in accordance with the provisions of the Statute.

Promptly after Receiver was appointed, petitioner filed a petition herein with FALLON, V.-C., who had appointed the Receiver, asking for an order of leave to make the Receiver a party defendant in an interpleader suit that the matter in controversy might be adjudicated in interpleader. The order was not granted, reference being made by FALLON, V.-C., to the case of *Rowe v. Gouse*, 2 Misc. Repts. 829 (1924), decided by V.-C. BENTLEY.

Petitioner then demanded that Receiver set off as against the amount due by petitioner to defendant, the amounts primarily due from defendant to Hudson Builders Material Corp. and Washburn Brothers Co., Inc. The Receiver determined not to make such setoff, and disallowed the same.

Receiver afterwards brought action at law against petitioner for \$6,517.27, the amount due from petitioner to defendant. Petitioner filed an affidavit of merits, and also the time for petitioner to answer in this action at law was extended by consent in writing until ten days after order or decree on the petition to be filed by petitioner should be made.

Petitioner then filed its petition asking that the Receiver be instructed to make the setoff claimed as a setoff that should be made "according to law and equity," and one that should be made because "equitable and just." The petition was filed under Sections 78 and 66 of the Corporation Act, and also it invoked the inherent jurisdiction of the Court of Chancery.

Petitioner paid the claims of Hudson Builders Material Corporation and Washburn Brothers Co., Inc.

The Vice-Chancellor decreed against petitioner and affirmed the determination of the Receiver in disallowing the setoff.

### POINT I.

We respectfully submit that the action of the Receiver in disallowing petitioner's demand for a setoff was clearly unconscionable; that the decree sustaining the Receiver's determination is inequitable and contrary to the dictates of substantial justice; that the decree is not supported by the authority of any case decided in this Court; that it is contrary to a decided case of this Court; and that it is contrary to a decided case in the Court of Chancery. The decree would compel petitioner, an innocent party who had not, either by act or omission, created the situation on which the decree is based, and who had no power to avoid that situation, to make a double payment, which payment would result in the unjust enrichment of the Receiver at the expense of the petitioner.

### POINT II.

#### **The setoff should have been allowed under Section 78 of the Corporation Act.**

Section 78 of the Corporation Act, reads as follows:

Every such insolvent corporation, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall, in a summary way, hear

and determine the matter complained of, and make such order touching the same as shall be equitable and just.

*Compiled Statutes*, page 1649.

We contend that the decree is not "equitable and just."

"The language of the 17th Section of the Act" (now Section 78) "is very comprehensive and would seem to have been adopted for the purpose of embracing every question which could possibly be brought before the Receivers for their action and by which action any person could complain of being aggrieved."

*Chancellor Williamson, in Jackson v. Peoples Bank*, 9 N. J. Equity 205.

"The act upon which the court is now called to adjudicate does not confine itself to legal setoffs. It refers to just setoffs, and expressly directs the receiver to allow them when they ought to be allowed according to *law* not only, but *equity* also. It would seem from the phraseology of the statute that the Legislature had something more in view than the general provisions of the law in regard to setoffs. It gives to receivers an equitable power, and they are to exercise it according to the justice of the case."

*Chancellor in State Bank v. Receivers*, 3 N. J. Equity 266.

This Receiver is an officer of the Court of Chancery, and acts under its direction. Even if petitioner had a clear legal right we respectfully contend that no reason appears why petitioner should be compelled to try the issue in a law court. If petitioner's right is equitable, it is conceivable that petitioner might not have full relief in a law court.

And if there is any question as to whether petitioner's rights are legal or equitable, petitioner should have relief in the Court of Chancery. The property in the possession of the Receiver is, in fact and in law, in the possession of the Court of Chancery, and subject alone to its order and control. The duty and responsibility of doing justice in respect to the disposition of the property rests wholly upon the Court having possession. The Court accomplishes its duty in respect to the property of the receivership by taking jurisdiction of all questions concerning its disposition.

The Vice-Chancellor recognized the existence of this broad power to be exercised "according to the justice of the case"; but we respectfully contend that he did not consider petitioner's rights at all under this Section 78. All that the Vice-Chancellor says in his opinion, after finding that the petition was before him under this 78th section, represents, we respectfully submit, not a consideration of the Receiver's determination under this 78th section, to ascertain if the determination was "according to the justice of the case," but only an endeavor to hold petitioner concluded, subject to right of appeal to this Court, by his decision on the petition. If petitioner could have persuaded the Court of Chancery to review the Receiver's determination under this 78th section, to ascertain if the determination was "according to the justice of the case," petitioner would have expected to be bound; but to give no consideration to the Receiver's determination under the power and duty given and imposed by this 78th section, and to also sweep away petitioner's right to defend in the action at law brought by the Receiver is, we respectfully contend, inequitable and unjust. (Petitioner's bond to pay in case petitioner is in this proceeding decreed to pay, is on file.)

While the Vice-Chancellor recognized this broad power to deal with this controversy, and his right to make an order "touching the same as shall be equitable and just," still he entirely disposed of the petition without considering the petition under the 78th section at all in these words:

"The only meritorious question presented on this appeal, namely, the right to a setoff, is a legal one which could be determined by the Circuit Court in the action already pending. (*Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283, 296.) If the receiver had moved to dismiss the appeal, I would have been inclined to grant the motion on the ground that the law court having first acquired jurisdiction should dispose of the controversy. (*Sweeney v. Williams*, 36 N. J. Eq. 627.) But the motion was not made."

If the Vice-Chancellor's view is correct, then it seems to us that the words "equitable and just" in this 78th section are empty of any protective meaning. The Vice-Chancellor's opinion shows that he did not give any consideration at all to the petition to ascertain what was "equitable and just," because he thought that as the Receiver had brought action in the law court the law court could determine the "legal" question, and he saw only a "legal" question. And here it should be said that the Receiver's determination, from which petitioner appealed, was *prior* to the Receiver's bringing his action at law; a situation, we respectfully state, the Vice-Chancellor did not notice, and which, if noticed by him, might have affected his decision.

And we respectfully contend that the Vice-Chancellor was in error as to even the "legal" rights of petitioner; and on the basis of petitioner's "legal" rights, that is, petitioner's rights in an action at law, or petitioner's rights in the very action

at law brought by the Receiver against petitioner he did not give consideration to what was "equitable and just," or what was "according to the justice of the case."

The Vice-Chancellor held:

"The right to a setoff must exist when the Receiver is appointed, or at the latest, when the day comes to plead it in the action at law, or else the right to a setoff never arises."

In support of this holding, he refers to no decided case in New Jersey, but only to several cases decided in other States. He considered that petitioner's time to answer the action at law brought by the Receiver had expired; but the fact is that petitioner's time to answer had been extended by the Receiver's consent until ten days after an order or decree should be entered on the petition (see Case). We respectfully state that the Vice-Chancellor did not note this situation, which is contrary to the facts assumed by him. The Vice-Chancellor not only gave no consideration to what was "equitable and just," or to what was "according to the justice of the case," but he swept away petitioner's right to file an answer in the action at law, in which action petitioner might have had relief, assuming that the Vice-Chancellor's views are correct, namely, that if petitioner's right to plead the setoff existed before the time to answer had expired, the same might be pleaded.

Without turning to a law dictionary, we may at least say that the word "equitable," even under all restricted definitions, connotes something different, something broader, something more protective, than remedial justice as administered in a court of law. And that the word "just," and the words "justice of the case" mean more than a rigidly strict application of the principles of the courts of law; that "just" and "justice of the case"

mean, at least, an approximation to substantial justice; that they mean protection against a double payment by an innocent party.

The doctrine of *Sweeney v. Williams*, 36 N. J. Equity, page 627, to which the Vice-Chancellor refers, is well known, namely, that if there exist a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the court of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law. And the language of MAGIE, J., in this *Sweeney v. Williams* case, may be quoted here:

“It is this proposition that I understand the learned Vice-Chancellor to have maintained in the opinion below. But I do not think the proposition was applied by him to this case, nor is it in my judgment, properly applicable thereto.”

The complainant is entitled, if at all, to a relief broader than could be afforded in the action at law.

We respectfully contend that the Receiver's determination from which petitioner appealed, was prior to the Receiver's action at law; and the petitioner's rights should be tested, at the least, as of the time of the Receiver's determination without reference to the Receiver's action at law afterwards brought; that petitioner is entitled to a relief broader than could be obtained in an action at law, and, moreover, that the Vice-Chancellor should have considered and decided the petition under the power given by and the meaning of this 78th section, which, we respectfully contend, he did not do.

May we point out that if the Vice-Chancellor has viewed the matter correctly, a “friendly receivership,” of which there are now so many, may place a

contractor on a public work at the mercy of an unscrupulous sub-contractor, who, by his own bill of complaint supported only by his own affidavit, for a receiver of his own corporation (really himself), can unjustly enrich his friendly creditors and himself,—all by his own act, to which the contractor is not in any way a party, and of which the contractor has no notice, and which the contractor can in no way avoid.

### POINT III.

#### **The setoff should have been allowed under Section 66 of the Corporation Act.**

The 66th section of the Corporation Act reads, in part, as follows:

The Receiver has full power \* \* \* in case of mutual dealings between the corporation and any person to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity.

*Compiled Statutes*, page 1643.

The Vice-Chancellor refers to the doctrine of *State Bank v. Receivers*, 3 N. J. Equity 266, which he quotes, namely:

“The act upon which the court is now called to adjudicate does not confine itself to legal set-offs. It refers to just set-offs; and expressly directs the receivers to allow them when they ought to be allowed according to *law* not only, but *equity* also. It would seem from the phraseology of the statute that the Legislature had something more in view than the general provisions of the law in regard to set-offs. It gives to receivers an equitable power and they are to exercise it according to the justice of the case.”

But we respectfully submit that the Vice-Chancellor did not apply this doctrine at all. He considered only "the general provisions of the law in regard to set-offs." What does the word "just" mean? Does it not mean more than "the general provisions of the law in regard to set-offs?"

The words "according to law and equity" mean "such set-offs as are in themselves just, whether legal or equitable."<sup>7</sup>

*Receivers v. Paterson Gas Light Co.*, 23  
N. J. Law 283.

The Vice-Chancellor's decision is found in these words:

"The right to a setoff must exist when the receiver is appointed, or at latest, when the day comes to plead it in the action at law, or else the right to a setoff never arises."

And the Vice-Chancellor gave no consideration whatever to this Section 66 (or, as we have pointed out, to Section 78) of the Corporation Act. We respectfully contend that he did not exercise the power conferred on the Court of Chancery by this Section 66 (or by Section 78).

The Vice-Chancellor did not decide with respect to whether the dealings of petitioner and the insolvent corporation were mutual within the meaning of this Section 66, although it may fairly be said that he thought the dealings were mutual; but as he held that petitioner had only a "legal" right, he simply says on this head:

"Does not the statute under which the petitioner gave bond supply the mutuality? It is unnecessary for me to answer this question."

There is a discussion of the meaning of "mutual dealings" in *Shields v. Shields Construction Co.*, 83 Equity, page 21. The opinion in this case refers

to the old and well known case of *Receivers v. Paterson Gas Light Co.*, 23 Law, page 299, which last named case is referred to in many of the later cases. The opinion in this *Shields* case points out that "mutual dealings" is a much broader phrase than "mutual debts" or "mutual credits." This *Shields* case opinion refers to *Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423, decided by this Court, which held that our Statute, in so far as it deals with insolvent corporations, is essentially a bankrupt act, and that its provisions should be construed accordingly, and this decision of this Court points out that the *Bankrupt Act* (Section 68), provides that "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It is to be noted that the opinion in the *Shields* case is to the effect that *even unmatured claims* may be set off in a receivership. The opinion in this *Shields* case disapproves the earlier decision in *McManus v. Pope*, 70 Atlantic Reporter 297, in which last named case an unmatured obligation was held not to be the subject of a setoff.

This *Shields* case was followed and approved in *Leech v. Campbell*, 142 Atlantic, page 364, in which case Vice-Chancellor LEAMING stated as follows:

"But in the subsequent case of *Shields v. John Shields Construction Co.*, 83 N. J. Eq. 21, 89 A. 922, it is pointed out that the provisions of our Corporation Act touching setoffs in cases of insolvent corporations are materially broader than the provisions contained in our general setoff act, and embrace all cases of 'mutual dealings,' a circumstance apparently overlooked in the earlier decision of Vice-Chancellor HOWELL. That view, in connection

with the decision of our Court of Errors and Appeals in *Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423, 70 Atl. 319, declaring the provisions of our Corporation Act, in so far as they deal with insolvent corporations, essentially a bankrupt act, impelled the conclusion that the right of setoff obtained in favor of an unmatured indebtedness.

“The views adopted in *Shields v. John Shields Construction Co.*, *supra*, which appear to be unassailable, must be regarded as controlling, and the right of the trust company to offset its unmatured claim must be recognized.”

“Mutual dealings” means all dealings between the parties to which the parties are parties. This excludes a claim purchased by one of the parties with the purpose of setting up such claim as a set-off against the Receiver.

“Mutual dealings” means “dealing together.” The meaning of the words is very broad.

*Receivers v. Paterson Gas Light Co.*, 23 N. J. Law, at page 298.

#### POINT IV.

**Petitioner is substantially “a statutory surety” and as such is entitled to a setoff.**

All the dealings of the insolvent corporation and the petitioner were subject to the Act of 1918.

The petitioner became obligated, as surety, to pay Hudson Builders Material Corporation and Washburn Brothers Co., Inc., the moment the material of these two companies was supplied to the construction, the defendant *then* being liable to pay the same to these two companies, and not making payment; and this obligation or liability existed before the Receiver was appointed. This

liability or obligation arose by virtue of the *Act of 1918*; and thus the petitioner, before the Receiver was appointed, was "a Statutory Surety" of the defendant for the payment to these two companies of the amounts due primarily from the defendant to these two companies. The provisions of this Act for service of statement of claim on the surety on the bond relate only to the enforcement of the claims of these two companies. The petitioner could in no way escape payment.

The case of *Wagner v. Burnham* (73 Atlantic Reporter, p. 990) is a case similar to the instant case. In that case the defendant was obliged to pay the debt of the insolvent corporation because of a Statute and the Court held that in this situation, as the defendant in that case was obliged to pay the insolvent corporation's debt because of the Statute, the defendant was "*a Statutory Surety,*" or "*a quasi surety.*"

#### POINT V.

**Petitioner is entitled to a setoff because the provisions of the Corporation Act with relation to insolvent corporations are substantially a Bankrupt Act.**

*Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423 (1908), decided by this Court, is to this effect.

A setoff or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months after such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

The present bankruptcy statute provides that, "In all cases of mutual debts or mutual credits between the estate of a bankrupt and the creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Similar provisions are contained in the former United States bankrupt act and in the English acts.

A person who is secondarily liable for a debt of the bankrupt, as endorser or security, has a provable claim against the estate provided the principal creditors fail to prove his debt.

*Loveland on Bankruptcy*, page 625, and cases cited.

See also

*Wagner v. Burnham*, Supreme Court Pennsylvania, 73 Atlantic, page 990.

In this *Wagner v. Burnham* case it was held that the defendant's claim might have been contingent at the adjudication of bankruptcy and was not then payable—although such claim is provable under the present bankrupt law—and yet if it had been liquidated, as here, by payment before the defendant was sued, he was allowed without question, to set it off.

"These words, as it seems to us, following the cases, refer to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a setoff of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. \* \* \* 'Provable' means provable in its nature at the time when the setoff is claimed, not provable in the pending bankruptcy proceedings. This case is followed and approved by the *United*

*States Circuit Court of Appeals in Norfolk & W. Ry. Co. v. Graham*, 145 Fed. 809, 813, 76 C. C. A. 385, 389. In that case it is said, *inter alia*: 'We think that the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is \* \* \* one that is provable in its nature, and need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding. \* \* \* It may be true that Pages' liability to the company was at the time of the filing of the petition and at the date of the adjudication contingent. But, before this liability was asserted as a counterclaim, it had become fixed and certain in amount. It was certainly provable in its nature when it was asserted in the court below.'"

*Wagner v. Burnham, supra.*

A person who is indebted to the bankrupt is entitled, as against the trustee, to assert and enforce any setoff or counterclaim which he may have and which he might have asserted against the bankrupt, and if the claim is such as would be provable against the estate, the fact that proof has not been made does not affect the right to assert it as a setoff or counterclaim in an action by the trustee to recover his indebtedness to the bankrupt.

Page 143, Vol. 7, *Corpus Juris*.

A court of equity will compel the trustee to allow as a setoff a claim against the bankrupt where injustice would otherwise result.

A debt not due may be set off against the indebtedness of a creditor to the bankrupt.

A surety who pays the debt of his bankrupt principal, after the adjudication in bankruptcy may set off the amount so paid against his own debt to the bankrupt.

If one is jointly indebted with the bankrupt and pays the debt, setoff is allowed. This is a mutual credit.

*Ibid.*

If a claim of a creditor who is also a debtor of the estate, is provable in its nature, the fact that he has not proved it in a year does not affect his right to offset it.

*Norfolk v. Graham*, 145 Fed. 809;  
*Steinhardt v. National Park Bank*, 120  
App. Div. 255.

#### POINT VI.

**The setoff should have been allowed because just, because of the "sense of natural justice among mankind"; under "the General Doctrine of Natural Equity."**

This Receiver has only the rights of the defendant over whose property he is placed, and all property rights pass to him as they existed prior to his appointment and are subject to the same equities. The Receiver can have no greater or better rights than the defendant had.

*Smith on Receivers*, Section 55, Note, page 138.

Petitioner is entitled to relief under "The General Doctrine of Natural Equity."

*Chief Justice in Receivers v. Paterson Gas Light Co.*, 23 N. J. Law, pages 290-306.

"In cases of cross-indebtedness, the assets consist only of the *balance* of the accounts."  
(The italics are those of the Chief Justice.)

*Ibid.*, at page 294.

“And there is no equality and no equity in putting a debtor of the bank, who has a just and legal setoff as against the corporation, in a worse position, and the creditors in a better position, by the failure of the bank and the appointment of Receivers.”

*Ibid.*

In *Green v. Farmer*, 4 Burr 222, Lord MANSFIELD, in delivering the opinion of the Court, remarked:

“Natural equity says that cross-demands should compensate each other by deducting the less sum from the greater; and that the difference is the only sum which can be justly due.” “Where there were mutual debts unconnected, the law said they should not be set off, but each must sue. The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, &c. (directing mutual demands to be balanced)”;

and he attributes the origin of the statutes of George II “the glaring injustice of not setting off mutual debts against each other.”

*Ibid*, page 306.

In allowing a setoff the Receivers would have been sustained by the case in *2 Green's Ch. Reports*; by the course of equity decisions in New York; by the practice understood to exist in this state in the settlement of insolvent estates; and, I may add, by what seems always to have been “*the sense of natural justice among mankind.*”

*Ibid*, page 309.

“It is a natural equity where there are cross-demands that one debt should compensate the other and that the balance alone should be paid by the party who owes the larger debt.

\* \* \* *That which would be unjust and un-*

*conscientious if done by the insolvent himself, certainly cannot be equitable and right when done by the officers of a court of equity who have succeeded to the rights and duties of the insolvent. \* \* \* The natural equity \* \* \* is superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of offset is claimed."*

*Chancellor in Hollbrock v. Receivers, 6 Paige 220.*

All through the cases we find the courts endeavoring to do equity, to proceed on equitable principles, to do justice, to sweep away the harsh injustice of old decisions, to bring the law up to date, to recognize modern business conditions, to have a Receiver act as a just man, to give a Receiver no greater rights than the insolvent corporation had.

The power to decree a setoff is inherent in courts of general equity ~~jurisdiction~~ jurisdiction, being independent of statute.

*Lawrence Equity Jurisprudence (1929), Section 1073.*

*"A court of equity should not hold itself powerless to relieve from loss in a very real sense fixed on an endorser \* \* \* merely because his demand was not matured. The trend of the more recent cases appears to be toward this attitude and away from the influence of common law rules 'sometimes harsh in their exactness.'"*

*Ibid, Section 1074.*

It is certainly unconscientious for an insolvent to coerce the payment of his claim when he is owing the other party an equal or larger sum.

*Ibid, Section 1077.*

Lack of mutuality does not present an insuperable obstacle, if irremediable injustice would otherwise ensue. *Insolvency, for example, has been held to create an injustice warranting its exercise.*

*Ibid*, Section 1079.

## POINT VII.

### An Unmatured Indebtedness May Be Set Off.

The setoff should have been allowed on equitable principles, and under the authority of *Shields v. Shields Construction Co.*, 83 N. J. Equity, 21, STEVENS, V.-C. (1914) and *Butler v. Commonwealth Tobacco Company*, 74 N. J. Equity, 423 (1908), decided in this Court.

In *Shields v. Shields Construction Company*, STEVENS, V.-C., held that an unmatured indebtedness might be set off against a Receiver. The decision of Vice-Chancellor STEVENS in this case rests on the opinion of this Court in *Butler v. Commonwealth Tobacco Company*.

A court of equity should not hold itself powerless to relieve from loss in a very real sense fixed on an endorser \* \* \* merely because his demand was not matured. The trend of the more recent cases appears to be toward this attitude and away from the influence of common law rules "sometimes harsh in their exactness."

*Lawrence Equity Jurisprudence* (1929),  
Section 1074.

**POINT VIII.****The decree unjustly enriches the Receiver at the expense of petitioner.**

“To the jurist unjust enrichment is not a moral or ethical notion, but a legal one with an economic justification.”

*Lawrence Equity Jurisprudence* (1929),  
Section 723.

“The payment or discharge by one of an obligation which in whole or part should rest primarily upon another may operate to unjustly enrich the latter. As in the absence of an agreement, express or implied, there is no legal redress for this inequity, courts of equity, or legal tribunals in the exercise of an equitable function, have assumed the duty, borrowed from the civil law, of ‘placing the charge where in equity it belongs,’ seeking to prevent the unjust enrichment otherwise inevitable and to compel the ultimate bearing of the burden by the one primarily liable.”

*Ibid*, Section 739.

“The real beneficiary of an obligation should be made to discharge the burden. When, therefore, one who is only secondarily liable, or who has an interest to protect, or otherwise in good faith and under such circumstances that he is not a ‘volunteer’ discharges such an obligation, or is in danger of compulsory payment, he may be entitled to appropriate relief to have the ultimate incidence fall where it should.”

*Ibid*, Section 740.

In conclusion, we respectfully submit that the decree is wrong; that, even if this matter is to

be decided under the decisions of the law courts, petitioner is entitled to relief, because petitioner's rights were really set before the appointment of the Receiver herein; that petitioner is entitled to relief under Sections 78 and 66 of the Corporation Act, and also under the power and duty of the Court of Chancery given and imposed irrespectively of these sections; that it appears from the opinion of the Vice-Chancellor that his decision rests only on an application of "dry and harsh" decisions of courts of other States relating to the law of setoffs in the law courts; that the Vice-Chancellor did not examine this matter at all under Section 78 of the Corporation Act, to ascertain and decide what was "equitable and just," or under Section 66 to ascertain and decide whether the setoff should have been "allowed according to law and equity"; that under these sections petitioner is entitled to relief.

MARSHALL VAN WINKLE,  
*Of Counsel with A. W. Crone &  
Son, Inc., Petitioner-Appellant.*

## New Jersey Court of Errors and Appeals

GEORGE K. NUTZ,  
Complainant,

*and*

MURRAY-NUTZ, INC., a corpora-  
tion of New Jersey,  
Defendant.

A. W. CRONE & SON, INC.,  
Petitioner-Appellant.

On Appeal of  
A. W. Crone &  
Son, Inc., from  
The Court of  
Chancery.

### POINTS ON BEHALF OF MARTIN J. MONA- HAN, JR., RECEIVER FOR MURRAY-NUTZ, INC., THE ABOVE-NAMED DEFENDANT.

#### The Facts.

On October 13th, 1928, petitioner-appellant, A. W. Crone & Son, Inc., entered into a contract with the State Board of Education of New Jersey, for the erection and construction of an addition to the State Normal School at Jersey City. This contract was not filed in the Clerk's office of Hudson County.

The petitioner-appellant and the Fidelity & Deposit Company of Maryland entered into a bond in the manner and form prescribed by an Act of the Legislature of the State of New Jersey, entitled "An Act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public work (L. 1917, C. 75, p. 203, amended by L. 1920, C. 110)." This

bond was filed with the State Board of Education by the said petitioner-appellant.

On November 22nd, 1928, the said petitioner-appellant entered into an agreement with Nutz & Reier, a corporation, whereby the said Nutz & Reier agreed to do the plastering work for the above-mentioned addition. All the plastering work was completed as agreed upon between the said petitioner-appellant and the last mentioned corporation; and the building was accepted by the State Board of Education on March 27th, 1930. During the course of the said work the name of Nutz & Reier, a corporation, was changed in accordance with the provisions of the Corporation Act to Murray-Nutz, Inc., a corporation.

On January 13th, 1930, in a suit pending in the Court of Chancery, wherein George K. Nutz is complainant and Murray-Nutz, Inc., a corporation, is defendant, the said defendant was adjudged to be insolvent, and thereupon the Court appointed Martin J. Monahan, Jr., Receiver for the said insolvent corporation.

At the time the Receiver was appointed, the petitioner-appellant was indebted to the insolvent corporation in the sum of \$6,517.27, representing the balance due for the work performed at the State Normal School Addition, and also the sum of \$51.47, representing the balance due for extra work performed at the Fishnet & Twine Building, Jersey City, New Jersey.

The above-named insolvent corporation was indebted to Washburn Bros. Co., Inc., in the sum of \$452.85, and was also indebted to the Hudson Builders Material Corporation in the sum of \$6,331.86. These claims of the aforementioned supply concerns were for the furnishing of materials to the insolvent corporation which were used in the performance of its contract at the State Normal School Addition aforesaid.

The Receiver demanded from the petitioner-appellant payment of the above sums, to wit: \$6,517.27 and \$51.47. The petitioner-appellant refused to pay the same. Thereafter, and on April 2nd, 1930, Receiver instituted suit in the Hudson County Circuit Court against the petitioner-appellant to collect the aforesaid sums of money. Petitioner-appellant filed the usual affidavit of merits in said action at law. Afterwards, and on April 14th, 1930, petitioner-appellant filed its petition (State of Case, p. 12) praying that the Receiver be ordered and directed to allow as a just set-off the amounts claimed by the above-named creditors as due to them respectively from the above-mentioned sum. On June 10th, 1930, the petitioner-appellant amended its petition (State of Case, p. 25) and at which time or shortly thereafter paid the materialmen the sums due them.

No oral testimony was taken in this matter. This cause was submitted to the Court of Chancery for its determination by counsel for the respective parties on the petitions and affidavits annexed thereto of the petitioner-appellant and the answers and affidavits annexed thereto filed by the Receiver of the defendant insolvent corporation (State of Case, p. 47).

*The petition for leave to sue Receiver in interpleader suit (State of Case, p. 5) and the consent extending time to answer in the law suit (State of Case, p. 12) are no part of the evidence or proof submitted in this case. These facts should be ignored in the brief of the petitioner-appellant.*

The learned Vice-Chancellor decreed that the claim of the petitioner-appellant set forth in its petition cannot be off-set against the indebtedness upon which the Receiver has brought suit.

**LAW.****POINT I.****The action of the Receiver in disallowing the claim of the petitioner-appellant to set-off was agreeable to law and good conscience.**

At the time the petitioner-appellant requested the Receiver to allow as a set-off the amounts due to the two materialmen who furnished materials to the insolvent corporation in the performance of its work at the State Normal School job, no evidence or records were submitted to the Receiver to warrant a determination in favor of the petitioner-appellant. The State of Case is devoid of any such proof or evidence, and, in fact, no evidence or proof whatever was submitted to the Receiver to support the claim of the petitioner-appellant.

Nevertheless, the situation at the time the Receiver refused to allow the set-off was as follows: The petitioner-appellant was indebted to the Receiver of the insolvent corporation in the sum of \$6,568.74 for the work performed by the insolvent corporation at the State Normal School addition and Fishnet & Twine Building, Jersey City. The insolvent corporation was indebted to two materialmen for the furnishing of materials at the State Normal School addition. These materialmen served written notices upon the petitioner-appellant demanding payment of their respective bills. But, however, no steps were taken by the two materialmen against the surety company under the bond filed with the State Board of Education of New Jersey (State of Case, pp. 12-19).

The Vice-Chancellor affirmed the action of the Receiver in disallowing the claim of the petitioner-appellant to a set-off, and in his opinion says:

“Until the defendant company became insolvent the petitioner had no claim against it whatever. It could not have resisted payment of the amount due the defendant on the theory that defendant might not pay the materialmen and that it, the petitioner, would be called upon to pay them. \* \* \* The petitioner had no claim against the Receiver until it had paid the materialmen some time after the Receiver instituted an action at law and after the petitioner had filed its original petition herein. Clearly then the petitioner had no right to a set-off when its application was made to the Receiver. His determination denying the application was correct.”

The determination of the Receiver in the denial of a set-off to the petitioner-appellant and the affirmance of the Receiver's determination by the Vice-Chancellor is in harmony with the rule enunciated in the case of *Coppola v. Grande*, 96 A. 67, decided by this Court. Another reason for denial of the set-off is the absence of “mutual dealings” as required under Section 66 of the Corporation Act more fully treated under Point III of this brief.

## POINT II.

### **Section 78 of the Corporation Act is not a substantive right to a set-off.**

Counsel for the petitioner-appellant sets forth at page 4 of his brief, Section 78 of the Corporation Act as an authority why the alleged set-off should be allowed. This section was amended by

L. 1913, p. 410, and in the present form, reads as follows;

“Any person aggrieved by the proceedings or determination of such Receiver in the discharge of his duty may appeal to the Court of Chancery within thirty days after notice of such proceedings or determination or such further time as the Chancellor may allow, which court shall in a summary way hear and determine the matter complained of and make such order touching the same as shall be equitable and just. The word ‘person’ used in this section shall include all persons artificial or natural.”

The above section confers a right to an aggrieved person to take an appeal from the determination of a Receiver to the Court of Chancery. In other words, Section 78 aforesaid cannot be urged as allowing a set-off; but merely confers a right of appeal. Hence, the Section is procedural in nature.

Needless to say, a naked right of appeal does not endow the petitioner-appellant with a right to a set-off. A right to a set-off must rest upon established principles of substantive law. Consequently, Section 78 aforesaid is authority only for the proposition that one aggrieved by the determination of a Receiver may appeal to the Court of Chancery, and in no sense of the word can it be said that said Section is a declaration of a substantive right to a set-off. It follows, therefore, that Point II of the petitioner-appellant's brief is palpably without any basis in law or equity for the allowance of a set-off.

### POINT III.

**There is no right to a set-off under Section 66 of the Corporation Act in the absence of "mutual dealings".**

Counsel for the petitioner-appellant under Point III in his brief, points to the provisions of Section 66 of the Corporation Act, which Section in dealing with the powers of a Receiver, among other things provides:

"The Receiver has full power \* \* \* in case of mutual dealings between the corporation and any person to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity." 2 C. S. 1643.

and argues that under this Section, the petitioner-appellant is given the right of set-off which it claims to have in these proceedings.

The transactions between the insolvent corporation and the petitioner-appellant were agreements by the insolvent corporation to perform work for the petitioner-appellant in consideration of a stipulated sum or reasonable value thereof to be paid by the petitioner-appellant. In other words, there only existed a unilateral extension of credit from the insolvent corporation to the petitioner-appellant. There were no reciprocal extensions of credit between both parties. In a word, the relationship between the parties was: Murray-Nutz (insolvent defendant corporation)—creditor; A. W. Crone & Son, Inc. (petitioner-appellant)—debtor. Manifestly, there were no mutual dealings between the petitioner-appellant and the insolvent corporation. *Receiver v. Patterson Gas Light Co.*, 23 N. J. L. 298.

The facts in the case *sub judice* do not come within the purview of the above section or the cases of *Shields v. Shields Const. Co.*, 83 N. J. E. 21; *Butler v. Commonwealth Tobacco Co.*, 74 N. J. E. 423, and *Leech v. Campbell*, 142 Atl. 922, cited by counsel for the petitioner-appellant under Point III in his brief. In those cases the relationship between the parties was that of a banker and depositor—there was an extension of credits from one to the other. Both parties were in fact actually dealing with each other. There, the Court determined under those facts, that the parties were mutual dealers.

Counsel for the petitioner-appellant, at page 12 of his brief, adverts to Section 68 of the Federal Bankruptcy Act to support his contention that there were mutual dealings between the parties. The Bankruptcy Act has no application in the premises. The Corporation Act (Sections 63 through 86-d) provides a complete system for the administration of affairs of the insolvent corporation created under the provisions of the Act. Unless the provisions of the statutes are similar in language, or the Corporation Act is silent on the point in question, adjudications construing the Federal Bankruptcy Act cannot apply. *Butler v. Commonwealth Tobacco Co.*, *supra*.

Counsel for the petitioner-appellant, at page 13 of its brief, says that “mutual dealings mean all dealings between the parties to which the parties are parties”. No authority is cited to support this contention. This Court has answered this contention in the case of *Moore v. Richards*, 110 A. 380, 90 L. 626, against the petitioner-appellant. In that case the defendants agreed in writing to produce from their respective farms tomatoes of a given quality by a certain time, and deliver the same to the vendee, and when the vendee was declared insolvent before the period mentioned in

the contract and Receiver was appointed therefor, in a suit by the Receiver to collect a claim against the defendants for fertilizer, which claims were admittedly correct, the defendants set up by way of set-off their unliquidated demands against the insolvent company, for failure to receive the tomatoes. Held, that the demands of the defendants were not capable to set-off under the corporation act, which allows the right of set-off only to claims arising out of mutual dealing.

The subject matter of the set-off is based upon money voluntarily paid by the petitioner-appellant directly to the two supply concerns, after the filing of the original petition for a set-off, without the consent of the Receiver. The Receiver had nothing to do with the transaction between the supply concerns and the petitioner-appellant, and in addition thereto, there were no dealings between the two materialmen and the petitioner-appellant until the payment of their claims against the insolvent corporation by petitioner-appellant. The Vice-Chancellor in his opinion says "there was no privity of dealings held between the defendant and the petitioner" (State of Case, p. 60). It follows, therefore, that the petitioner-appellant has no right to a set-off under Section 66 of the Corporation Act in the absence of the element of "mutual dealings" between the parties.

#### POINT IV.

**Petitioner is not "a statutory surety" substantially or otherwise and is not entitled to a set-off.**

The petitioner-appellant executed a bond pursuant to provisions of L. 1918, C. 75 as amended by L. 1920, C. 110, in connection with the execution of the contract by the petitioner-appellant

with the State Board of Education of New Jersey, for the erection of the addition to the State Normal School. The facts are undisputed that the building was accepted by the State Board of Education subsequent to the appointment of the Receiver; that Hudson Builders Material Corporation and Washburn Brothers Co., Inc., who were two creditors of the insolvent corporation for the materials furnished by them in the performance of the work by defendant insolvent corporation at the State Normal School Addition, furnished statements to the Fidelity & Deposit Company of Maryland, the surety in the bond referred to above, after the acceptance of the said building, so that the said statements were filed after the Receiver was appointed herein. It is further admitted that the petitioner-appellant paid the alleged claims of the above two materialmen against the defendant insolvent corporation after the suit was instituted by the Receiver against the petitioner-appellant in the Hudson County Circuit Court for the amount claimed by the Receiver to be due from the said petitioner-appellant to the defendant insolvent corporation, and after the original petition was filed praying for a set-off.

The petitioner-appellant contends that it became obligated as surety to pay the above creditors the moment the material of these two creditors was supplied to the construction of the building, and that the said obligation or liability existed before the Receiver was appointed. The petitioner-appellant further contends that this liability or obligation arose by virtue of the above statutes and that the petitioner before the Receiver was appointed was a statutory surety of the insolvent corporation for the payment to above creditors of the amounts due primarily from the insolvent corporation.

There was no obligation or liability on the part of the petitioner or the bonding company until

after the building was accepted and a statement was filed with the bonding company in compliance with the provisions of Section 3 of the above statute. *Franklin Lumber Co. v. Globe Indemnity Co.*, 130 At. 608; *Fireproof Products Co. v. Dreher*, 141 At. 795.

No obligation, therefore, arose until after the Receiver was appointed who clearly had a prior claim to the fund. By Section 68 of the General Corporation Act, all personal property of an insolvent corporation vests forthwith in the statutory receiver upon his appointment and by Section 86-D, the said title dates back to the date of filing of bill, same having been filed January 7th, 1930. See *Mack Mfg. Co. v. Citizens Const. Co.*, 96 At. 101.

The phrase "Statutory Surety" does not avail the petitioner in this case. The obligation does not arise out of a statute, but arises out of a bond voluntarily entered into by the petitioner pursuant to the above statute. The petitioner relies on the case of *Wagner v. Burnham*, 73 At. 990, a Pennsylvania decision, which will receive further attention later in this argument. In that case, it must be observed at this time, that the statute referred to is the Mechanic's Lien Act, which is similar to our statute. But the petitioner's difficulty is aggravated by the fact that neither the municipal lien act nor the General Lien Act applies to the case at bar.

The municipal lien act does not apply because the State Board of Education is not a municipality within the purview of the act. See *Curtis v. State Highway Commission*, 91 N. J. E. 421.

The general mechanic's lien act does not apply because of the failure of the State Board of Education or the petitioner-appellant to file the contract as provided by Section 2 of the said act. Consequently, the two materialmen had no right

to a stop notice. *Frank v. Freeholders*, 10 Vroom 347.

Ordinarily, a subcontractor or a materialman could file a lien in such a case. But where the owner of the property or building is a public body, sovereign state or political subdivision thereof, no lien can be filed. See *Frank v. Freeholders* (*supra*).

However, if the above lien acts did apply to the present situation, the petitioner-appellant would not be entitled to the relief sought. As against the petitioner-appellant, who is endeavoring to prefer the said two creditors over all other creditors of the defendant insolvent corporation, the Receiver is entitled to the fund for the reason that the Receiver was appointed prior to any stop notice filed by virtue of the lien acts, and prior to the filing of a statement of claim under the provisions of the bond; therefore the fund has fallen in *custodia legis*. See *Agnew Co. v. Paterson Co.*, 83 N. J. E. 49; *Mack Co. v. Citizens Co.*, 85 E. 331 and 86 E. 254 and *Ocumpangh v. Linde Co.*, 120 At. 639.

The case of *Wagner v. Burnham* (75 A. 990), does not sustain petitioner-appellant's contention. In the first place, the situation deals with the mechanic's lien act. In our case the mechanic's lien acts do not apply, and petitioner-appellant relies upon the bond given pursuant to the laws of 1918 as amended in 1920. Secondly, in the cited case, the action arose on the contract to which the defendant Burnham and the bankrupt were parties, whereas in the case at bar the defendant insolvent corporation was not a party to the bond nor is the suit in the Hudson County Circuit Court based on the bond. Thirdly, it appears in the *Wagner* case, that the defendant Burnham paid the lien claimant for which amount he claimed a set-off, before the Trustee instituted his suit;

while in case at bar, the creditors were not paid until after the Receiver instituted his suit in the Hudson County Circuit Court and after the petitioner-appellant herein filed its original petition. It must be noted that the Pennsylvania Court laid great stress on the fact that payment was made before the Trustee instituted his suit, and that fact appears to be one of the principal reasons for the court's determination. Finally, the owner of the building in the Pennsylvania case was not, as in the case at bar, a sovereign state or a political subdivision thereof, so that the question of inchoate right of lien dating back to the date of commencement of the building does not apply to our situation. The Pennsylvania Court laid great stress on the fact that the claim of the lien claimant was vested or inchoate, which the owner by virtue of the lien act was obliged to pay. In the case at bar, there was no vested or inchoate lien in favor of the two creditors whose right of recovery was contingent upon the compliance of Section 3 of the Laws of 1918 aforesaid, and this was done after the appointment of the Receiver.

Further, the decision in the *Wagner v. Burnham* case rests upon a construction of Federal Bankruptcy Act, which has no application in our case (see Point V herein). In our case, the situation deals with the administration and distribution of assets of an insolvent corporation under our Corporation Act. The petitioner-appellant is limited to the provisions of the Corporation Act for its remedy, if it has any (*Steel & Iron Monger v. Bonnite Insulator Co.*, 90 E. 200; *Lehigh Coal and Navigator Co. v. Central Rd. Co. of N. J.*, 29 N. J. E. 252).

There can be little or no doubt that the case of *Wagner v. Burnham* adverted to by counsel of petitioner-appellant at page 14 of his brief has no application to the facts in this controversy;

consequently the contention that the petitioner-appellant is substantially a statutory surety, is untenable.

#### POINT V.

**The petitioner-appellant must predicate its right to a set-off under the provisions of a Corporation Act and not under the provisions of the Federal Bankruptcy Act.**

The Corporation Act, Section 63 through 86-d, is intended to provide a system for the administration of affairs of insolvent corporations. In the *Butler* case (*supra*), to which counsel for the petitioner-appellant adverts, this Court dealt with a situation where the question was whether a secured creditor holding collateral should apply his collateral in the first instance to the payment of his debt, and prove only for the balance, or whether he should prove for the entire amount first. There was no provision in the Corporation Act which by its terms applied to such a situation, or directed how it should be dealt with. The Court, in considering the question, came to the conclusion that the creditors should be compelled to apply the collateral in the first instance, and prove for the balance, and quite unnecessarily, added that inasmuch as this was the rule in bankruptcy for over seventy years, it would follow that rule.

It cannot be seriously maintained that the Court meant by this decision to say that where the statutory enactments of our State differed from the statutory enactments of the Bankruptcy Act, we would follow the provisions of the Bankruptcy Act, or even that the Court meant by its decision in the *Butler* case to say that where there was a positive enactment by the Bankruptcy Act, our courts would unhesitatingly and without consid-

eration of questions of principle, adopt the rule of the Bankruptcy Act.

Section 68 of the Bankruptcy Act is quoted at the top of page 15 of the petitioner-appellant's brief. The language of that section differs so materially and ostensibly from the language of Section 66 of the Corporation Act that the provisions of Section 66 of our Corporation Act cannot, by process of reasoning, be said to be an analogue to Section 68 of the Bankruptcy Act.

Counsel for the petitioner-appellant under Point V of his brief argues that the petitioner is entitled to a set-off because the provisions of the Corporation Act with relation to insolvent corporations are substantially a Bankrupt Act, and for that reason this Court shall apply the rule laid down by Section 68 of the Bankruptcy Act. This argument is untenable. The Federal Bankruptcy Act and the provisions of our Corporation Act in connection with insolvent proceedings are separate and distinct. They operate independently and apply to circumstances only peculiar to its respective provisions.

This Court is not called upon in this case to decide between the legislative policy of the House of Congress and the Legislature of the State of New Jersey, but only to determine the intent of the Legislature of the State of New Jersey, using as its source the legislative enactments of that Legislature, and the decisions construing them. Of course, reference is often had to enactments of the House of Congress, or to the Legislatures of the various States, as an aid and guidance in the interpretation and construction of legislative enactments of our State, but such reference is had only when our statutes are by their terms silent with regard to a set of facts being litigated, or may be differently interpreted because of the generality or ambiguity of the language employed in this statute.

It is submitted that the provisions of the Corporation Act here considered are so specific, and the meaning of the terms employed are clearly ascertainable from the statute itself, that no further guide or assistance by way of enactments of the House of Congress or the various Legislatures is needed. To permit the Federal Bankruptcy Act to control over the provisions of our Corporation Act referred to herein would be in effect a perversion and conversion of the Corporation Act into a bankruptcy act. This is contrary and repugnant to the intent of the Legislature of our State.

#### POINT VI.

**There is no basis to the claim of the petitioner-appellant to a set-off under "the general doctrine of natural equity" or "sense of natural justice among mankind".**

The term "natural equity" means "that which is founded in natural justice, in honesty and right, and which arises *ex aequo ex bono*". Baldwin Century Edition of Bouvier's Law Dictionary, p. 934. This authority further says

"it corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it" \* \* \*.

By Section 68 of the Corporation Act, which reads as follows:

"All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a re-

ceiver, forthwith vest in him, and the corporation shall be divested of the title therein." See 2 C. S. 1644.

the Receiver of the defendant insolvent corporation became the legal owner of all the assets of the insolvent corporation as trustee for the benefit of all the creditors of the corporation.

Section 75 of the Corporation Act reads as follows:

"The Court of Chancery may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation; the court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time."

In the insolvency proceedings the Court made an order limiting the time for the presentation of claims by creditors. The two materialmen, who were paid by the petitioner-appellant on or after June 10, 1930, did not present their claims to the Receiver within the time prescribed by the order (State of Case, p. 24). Manifestly, the claims of these materialmen against the assets of the defendant insolvent were determined a long time prior to the payment of the same by the petitioner-appellant. *Moore v. Richards*, 90 N. J. L. 626.

Should the payment by the petitioner-appellant of the claims of the two materialmen against the defendant insolvent corporation establish a preference in favor of the petitioner-appellant against the claim of the Receiver of the defendant insolvent corporation against the petitioner-appellant? Undoubtedly, no. Needless to say, the petitioner-appellant had no right to pay these claims. No

reason has been pointed out, and I can see none, why the accidental possession of the funds in the hands of petitioner-appellant belonging to Receiver should give the petitioner-appellant a privilege of setting off the payment of the claims to the two materialmen against the claims of the petitioner under the doctrine of "Natural Equity". In a word, there is no equity in the case *sub judice* on the side of the petitioner-appellant.

Does the insolvency of a corporation and the appointment of a Receiver change the position of the rights of any person against the insolvent corporation? Ordinarily, the rights are not disturbed (*Crown v. Regna Const. Co.*, 146 At. 346); but to avoid a preference contrary to the provisions of the Corporation Act discussed herein, the ordinary rules must give way to more equitable rules of the doctrine of the equal distribution of corporate assets among all creditors. This was the very purpose of the Legislature of our State in enacting the provisions of the Corporation Act hereinbefore considered.

The rules and maxims of the Court of Chancery are as fixed and certain as those which govern the courts of law, and a court of equity has no more right than has a court of law to act on its own notions of what is right in a particular case, but must be guided by the established rules and precedent. Vice Chancellor Fallon in the recent case of *Rogosim v. City Trust Co. of Passaic, et al.*, 151 At. 834, denied the right to a set-off following established rules and precedent.

It is submitted that to allow a set-off under a sweeping statement of "natural equity" would not only be a denial and nullification of the efficacy of the positive and unequivocal declaration of the law and equity contained in Section 66 of the Corporation Act and in the cases adverted to herein, but would also constitute a virtual aban-

donment of the precedents of the Courts of this State. The doctrine of "natural equity" has no application in the presence of established rules and precedent.

## POINT VII.

### **The decree does not unjustly enrich the Receiver at the expense of petitioner-appellant.**

Reference is made by counsel for the petitioner-appellant under Point VIII of his brief to authority in connection with the question dealing with unjust enrichment. This authority refers to ordinary matters and does not deal with the situation presented in this case in which an insolvent corporation is involved.

The provisions of the Corporation Act adverted to herein purport to provide an entire system for the administration of affairs of an insolvent corporation formed under the provisions of that act. It is the manifest intention of the Legislature in the enactment of that Act, when a corporation is decreed to be insolvent under the terms of that Act, that the distribution of assets be made equitably, equally and ratably among all members of a given class. (See Section 86.) And the Act very specifically by its express terms manifests most positive legislative intent to avoid the creation of preferences in favor of one class of creditors to the prejudice of other members of the same class of creditors (see Section 64), which legislative intent has again been evidenced by the enactment but recently of Sections 86-b and 86-c of the Corporation Act. In view of this positive legislative intent, so easily ascertainable from the provisions of the Act itself, there is no merit to the argument of counsel for the petitioner-appellant that the decree unjustly enriches the Receiver.

The Receiver of the defendant insolvent corporation is entitled to the full amount of the money due from petitioner-appellant to the defendant insolvent corporation under well established rules of law described herein. To allow the petitioner-appellant a set-off, the same will constitute a preference, and accord it a preferential status, manifestly repugnant to the letter and spirit of the law which liquidates such claims upon a basis of equality, in the distribution of assets. C. S., p. 1652, Sec. 86; *Lehigh v. Stevens*, 63 N. J. E. 107.

It is quite obvious that under the facts in the case *sub judice* the doctrine of unjust enrichment adverted to by counsel for the petitioner-appellant under Point VII of his brief has no application, when the result of which will give one creditor a preference over other creditors of an insolvent corporation in violation of the provisions of the Corporation Act discussed in this brief, and when the same is also opposed to well established decisions of the Courts of our State.

### POINT VIII.

**Petitioner-appellant has an adequate remedy in the Law Court to assert its claim to any right to a set-off.**

Assuming for sake of argument (but not conceding as a fact) that the petitioner-appellant was entitled to a set-off against the claims of the Receiver, the petitioner-appellant was afforded a remedy in the Law Court by way of affirmative defense or counterclaim to the action heretofore instituted by the Receiver against the petitioner-appellant in the Hudson County Circuit Court. (State of Case, p. 8.)

It should be noted that the Receiver's action commenced in the Law Court was prior to the

commencement of these proceedings. The Law Court was the first tribunal to acquire jurisdiction in this controversy. In the case of *Receiver v. Paterson Gas Light Co.*, 23 N. J. L. 283, the Receiver instituted an action at law to recover the amount of a bill of exchange for \$500 accepted by the defendant, and which was endorsed to and held by the corporation at the time payment was stopped. The Law Court permitted the defendant to set-off its claim against the insolvent corporation in the same action. This remedy was also allowed in the Law Court in the case of *Wagner v. Burnham*, 83 A. 990, cited by Counsel for the petitioner-appellant in his brief.

Moreover, the petitioner-appellant is conceded to have an adequate remedy in the Law Court to the Receiver's action referred to above in the filing of an affidavit of merits, in which it stated under oath that "it has a just and legal defense to the Receiver's action on the merits of the case".

The Vice-Chancellor in his opinion at page 56 of the State of Case says:

"The only meritorious question presented on this appeal, namely, the right to a set-off, is a legal one which could be determined by the Circuit Court in the action already pending. *Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283, 296.) If the receiver had moved to dismiss the appeal, I would have been inclined to grant the motion on the ground that the law court having first acquired jurisdiction should dispose of the controversy. (*Sweeney v. Williams*, 36 N. J. Eq. 627.)"

It is submitted that since the Law Court first acquired jurisdiction the petitioner-appellant had no basis to invoke the jurisdiction of the Court of Chancery.

**POINT IX.**

**The decree is agreeable to equity and good conscience and should be affirmed.**

It has been pointed out herein that the determination of the Receiver in denying the claim of the petitioner-appellant to a set-off was proper; that in the transactions between the defendant insolvent corporation and the petitioner-appellant there was lacking the element of "mutual dealings" required under Section 66 of the Corporation Act as a condition precedent to a right to a set-off; that the right to a set-off did not exist when the Receiver of the defendant insolvent corporation was appointed, nor did the right to a set-off exist when the time came to plead it in the action of law; that in fact the right to a set-off in favor of the petitioner-appellant never existed in the case at bar; and that the petitioner-appellant had no legal basis to invoke the jurisdiction of the Court of Chancery since the Law Court first acquired jurisdiction in the controversy, where an adequate remedy is afforded.

Respectfully submitted,

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Defendant-Appellee.



